SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	4
1. Copyright Act	4
2. Communications Act of 1934	5
3. Second Report and Order on CATV Regulation	7
STATEMENT	7
A. The Facts	8
B. The Decisions Below	17
REASONS FOR GRANTING THE WRIT	21
THE DECISION BELOW BY A NOVEL INTERPRETATION GREATLY ENLARGED THE COPYRIGHT MONOPOLY IN DISREGARD OF BOTH THE PRINCIPLES OF STATUTORY CONSTRUCTION ADOPTED BY THIS COURT AND THE PRIMARY PUBLIC POLICY OF THE COPYRIGHT ACT AND OF THE COMMUNICATIONS ACT	21
1. The Decision Below Adversely Affects Millions of Television Viewers and Affects the Future of the Television Industry	23
2. The Decision Extends the Performance Monopoly in a Novel Manner	28
3. Mere Transmission of Electromagnetic Energy by a CATV Which "Contributed" to Viewing on Subscribers' Own Sets Produced Non-Infringing Private Performances in the Homes, Not a Public Performance by the CATV	33

Page

4. The Decision Below Disregards the Primary Policy of the Copyright Act and of the Communications Act 38

5. The Erroneous Interpretation Results in an Uncertain and Enlarged "Performance" Monopoly 43

6. The Court Below Rejected the License Implied in Law Under the Copyright Act and the Communications Act To Receive Authorized Broadcasts 45

7. The Decision Below Denies the Right to Receive Authorized Broadcasts Within the Service Area of the Broadcasting Stations as Measured Under F.C.C. Regulations and Substitutes a Novel and Unworkable Test of the Public's Right To Receive 47

8. The Decision Below Conflicts With F.C.C. Regulations 53

CONCLUSION 56

APPENDIX A—Opinion and Judgment of the United States Court of Appeals for the Second Circuit 1a

TABLE OF AUTHORITIES

CASES:

Adams v. *Burke*, 84 U.S. (17 Wall.) 453 (1873) 43
Aro Manufacturing Company v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 41, 46-47
Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339 (1908) 31
Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 19, 29, 30, 31, 32, 34, 35, 45
Canadian Admiral Corp. v. *Redifussion, Inc.*, [1954] Can. Exch. 382 .....31, 34
Chappell & Co., Ltd. v. *Associated Radio Co. of Australia, Ltd.*, [1925] Vict. L.R. 350 36
Columbia Broadcasting System, Inc. v. *TelePrompTer Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965) 26
Farmers Union v. *WDAY*, 360 U.S. 525 (1959) 55, 56

Page

Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir., 1925), *cert. denied*, 269 U.S. 556 (1925) 34, 35, 36
Jerome H. Remick & Co. v. *General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926) 36
Mazer v. *Stein*, 347 U.S. 201 (1954) 29
Messager v. *British Broadcasting Co.*, 2 K.B. [1927] 543, *rev'd on other grounds*, 1 K.B. [1928] 660, *aff'd* [1929] A.C. 151 36
Mellor v. *Australian Broadcasting Commission*, [1941] A.C. 491 36
Society of European Stage Authors & Composers, Inc. v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y. 1937) 30
U.S. v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) .. 43
U.S. v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 28
White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 28, 29, 30, 38

STATUTES AND RULES:

Communications Act of 1934:

47 U.S.C. § 151 5
47 U.S.C. § 153(o) 5, 6, 23, 39, 46
47 U.S.C. § 303(c) 5, 6
47 U.S.C. § 303(d) 5, 6
47 U.S.C. § 303(e) 48
47 U.S.C. § 303(g) 55
47 U.S.C. § 303(h) 5, 6, 41, 47
47 U.S.C. § 307(b) 5, 6
47 U.S.C. § 325(a) 5, 7, 52, 53

Copyright Act:

17 U.S.C. § 1(c) 3, 4, 9, 21, 37
17 U.S.C. § 1(d) 3, 4, 9, 21, 44
17 U.S.C. § 1(e) 30
17 U.S.C. § 101(b) 24

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 18

Code of Federal Regulations: Page

47 C.F.R. § 683(a) 54
47 C.F.R. §§ 21.710-21.714 52
47 C.F.R. § 73.658(e) 37
47 C.F.R. § 73.684 15
47 C.F.R. § 74.1103(a) 53
47 C.F.R. § 74.1107 54
47 C.F.R. §§ 91.557-91.561 52

Special Reports and Orders of the F.C.C.:

Sixth Report and Order on Television Allocations, 1 (part 3) Pike & Fischer R.R. 91:601 (1952) 15

In the Matter of Inquiry Into the Impact of Community Antenna Systems, etc., F.C.C. Docket No. 12,443, 18 Pike & Fischer R.R. 1573 (1959) ..37, 39, 53

Second Report and Order, Community Antenna Television Systems, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966) 7, 8, 15, 23, 40, 48, 54, 55

Texts:

Nimmer, *Copyright*, (1967) 34
Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514 (1967) 17, 43
Television Factbook (published by Television Digest)
Edition No. 35 (1965) 40
Edition No. 37 (1967) Services Volume 8, 23
Broadcasting Magazine, Vol. 71, No. 23, December 5, 1966 50

Legislative Materials:

Hearings on H.R. 4347 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., (1965) 42

Statements in Hearings pursuant to S. Res. 201 on S. 1006 before Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., (1966)
of Department of Justice 26, 27, 38, 42
of Chairman of the F.C.C. 50
of Register of Copyrights 22, 56

67th Cong. Rec. 12335 (1926) 46

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UNITED ARTISTS TELEVISION, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Fortnightly Corporation asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 22, 1967.

OPINIONS BELOW

The opinion of the court of appeals is reported at 377 F.2d 872 and is annexed hereto as Appendix A, *infra* pp. 1-24. The opinion of the United States District Court for the Southern District of New York

is reported at 255 F. Supp. 177 (1966) and appears in the Joint Appendix[1] at pages 19-107.

JURISDICTION

The judgment of the court of appeals here sought to be reviewed (App. A, p. 25) was entered on May 22, 1967. An application for extension of time to file a petition for writ of certiorari was granted by this Court on July 21, 1967, extending such time until September 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

A community antenna television system (CATV)—of which more than 1,700 are now in operation in the United States, serving about 6,000,000 television viewers in more than 2,000,000 television homes—operates by receiving through an antenna the signals of a television broadcasting station and transmitting these signals through wires to the homes of members of the public who subscribe to the system, so that the programs broadcast by the station may be viewed by the subscribers on their own television sets. In this case the court of appeals has held that defendant's operation of two such CATV systems infringed the copyrights claimed by plaintiff on motion pictures and cartoons that were broadcast—under license from plaintiff—by the television stations whose signals the CATV sys-

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[1] The original record in the court of appeals has been certified to this Court and will be cited as "R". The Joint Appendix in the court below—ten copies of which have been provided to this Court in accordance with this Court's Rule 21, par. 4—will hereinafter be cited as "JA", and the Joint Exhibit Volume be cited as "JE".

tems received and transmitted to their subscribers. The questions presented on this petition are as follows:

1. Whether the activity of a CATV system such as defendant's in receiving and transmitting through wires the electromagnetic waves broadcast by a television station—without producing or handling the visual image or sound of television programs anywhere in the system—constitutes, within the meaning of sections 1(c) and 1(d) of the Copyright Act, a "performance" of motion pictures broadcast by that station under license from the copyright owner, and whether any such "performance" is "in public" within the meaning of the Act, so that the operation of such a system constitutes infringement of the copyright on such motion pictures.

2. Whether the court below, in imposing copyright infringment liability on CATV systems for their activity in assisting members of the public to receive television broadcasts that have been authorized by the copyright owner through a license to the broadcasting station, announces a rule contrary to the policies of the Copyright Act and the Communications Act.

3. Whether, when a copyrighted motion picture has been licensed by the copyright owner for broadcast by a television station, and when that station has been licensed under the Federal Communications Act to disseminate only such radio communications as are "intended to be received by the public", a homeowner has a right to receive that broadcast through a means he finds convenient, such as subscribing to a CATV system like defendant's, and whether that right is protected by a license implied in law under the Copyright Act and/or the Communications Act.

4. Whether the public's right to receive such a broadcast through subscribing to a CATV system like defendant's is at least protected from copyright-infringement liability where the subscribers served by the CATV system are located within the normal predicted service area of the broadcasting station as delineated by regulations of the Federal Communications Commission.

5. Whether the statutory monopoly granted by the Copyright Act should be judicially extended to hold CATV systems unqualifiedly liable for copyright infringement when those systems are being regulated by the F.C.C. under a regulatory scheme embodying the F.C.C.'s conception of the public interest under the Federal Communications Act, and when such an inflexible judicial rule would be inconsistent with that regulatory scheme and in conflict with one of its key elements.

STATUTES AND REGULATIONS INVOLVED

1. *Copyright Act.* Section 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d)) provide as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or

reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * * "

2. *Communications Act of 1934; as amended.* Sections 1, 3(o), 303(c), (d) and (h), 307(b) and 325(a) (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b) and 325(a)) provide as follows:

* * *

Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority hereto-

fore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

* * *

Sec. 153(o). "'Broadcasting' means the dissemination of radio communication intended to be received by the public, directly or by the intermediary of relay stations."

* * *

Sec. 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall . . ."

* * *

(c). "Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;"

* * *

(d). "Determine the location of classes of stations or individual stations;"

* * *

(h). "Have authority to establish areas or zones to be served by any station."

* * *

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of

power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

* * *

Sec. 325(a). "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."

3. *Second Report and Order on CATV Regulation.* The F.C.C.'s regulatory scheme for CATV, is set forth in the lengthy and detailed *Second Report and Order, Community Antenna Television Systems* 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966). It will hereinafter be cited as *Second Report and Order,* and copies as issued by the F.C.C. are submitted herewith for the convenience of the Court.

STATEMENT

This petition seeks review of the decision of the court of appeals holding that the operation of defendant's community antenna television (CATV) systems, in receiving signals broadcast by television stations and transmitting those signals over wires to the homes of subscribing members of the public, constituted a "public performance" by defendant of motion pictures broadcast by the television stations under license from the copyright owner, and hence constituted infringement of the copyright on those motion pictures. There are presently in the United States more than 1,700 community antenna systems serving

more than 2,000,000 television homes with about 6,000,000 viewers,[2] and the instant case is the first to adjudicate the claim that the operation of such a system constitutes copyright infringement. Necessarily included in the infringement question are such issues as whether the copyright owner may exact from members of the public who subscribe to CATV a second royalty for the right to view a broadcast for whose release to the public the copyright owner has already received one royalty from the broadcasting station: and whether the dispersed and rapidly growing CATV industry, which is already an important part of the national communications system and is being regulated as such by the F.C.C., is to be subject to the legal and economic control of the relatively few networks and other organizations that control the copyrights on television programs.

A. The Facts[3]

Defendant Fortnightly Corporation (petitioner here) owned and operated two CATV systems in and around the towns of Clarksburg and Fairmont, West Virginia. Plaintiff United Artists Television, Inc.

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[2] *Television Factbook* No. 37 (1967), Services Volume, p. 54a. *Second Report and Order*, ¶ 31.

[3] The statement of the facts herein has been drawn, to the fullest extent consistent with the desire for brevity, from the opinion of the court of appeals. Indented passages herein are quotations from that court's opinion.

As the court of appeals stated, "the facts concerning the operation of defendant's CATV systems are essentially undisputed, and the issue is whether, as a matter of law, defendant publicly performs telecast copyrighted motion pictures. Our review . . . is therefore not circumscribed by the 'clearly erroneous' standard." (App. A, p. 3, n.2).

(respondent here) claims copyright in certain motion pictures and cartoons which it authorized for public broadcast over five television stations. Three of the stations are located in Pittsburgh, Pennsylvania, and one each in Wheeling, West Virginia, and Steubenville, Ohio. Plaintiff brought this action—one of first impression—seeking an injunction and damages on the ground that the operation of defendant's systems in receiving the signals of these stations and transmitting them to the homes of the systems' subscribers constituted infringement of plaintiff's copyrights. The principal issues thus presented were whether the operation of defendant's systems constituted a "performance . . . in public" of the copyrighted motion pictures within the meaning of sections 1(c) and 1(d) of the Copyright Act, and whether the operations of defendant's systems in aiding public reception of broadcasts licensed by the copyright owner were in any event protected from copyright-infringement liability by a license implied in law.

> "Pursuant to a pre-trial order, these issues were separated from unrelated issues,[4] and were tried on the assumptions that the plaintiff owned valid copyrights in the motion pictures and that defendant's CATV systems received and transmitted the signals of television stations which broadcast the motion pictures." (App. A, p. 3)

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[4] Reserved under the pre-trial order for subsequent trial were affirmative defenses relating to the particular facts of the case, including issues concerning the validity of plaintiff's asserted copyrights, the existence of a license implied in fact by reason of (among other things) plaintiff's course of conduct in dealing with the television stations, and the issue of estoppel, as well as copyright misuse and antitrust defenses and the question of damages.

It was further assumed that the telecasts with respect to which defendant was alleged to have infringed had been duly licensed and authorized by plaintiff through license contracts with the television stations. Plaintiff thus stipulated that the broadcasting stations were not guilty of infringement by reason of the telecasts in question, and plaintiff also stipulated that it did not contend that the members of the public who received and viewed the telecasts through subscribing to defendant's systems were guilty of copyright infringement. (JA 27-28, 809, 817).

To much of the American public, television merely requires the purchase of a television receiving set. However, the process of television broadcasting and reception requires that there be a receiving antenna and a connection from the antenna to the terminals of the set. Every television set must have a receiving antenna and connection in order to function. The built-in antenna in the television set may be sufficient for reception of nearby stations. In other instances or in less advantageous locations, so-called rabbit-ear antennas will be necessary to get adequate reception. Where the stations are at greater distances, or the receiving location is disadvantageously situated under a hill or other blocking terrain or a building, it may be necessary (and it is common) to place the antenna on a pole or mast on the rooftop or otherwise, and a longer wire or cable connecting the antenna to the set, sometimes along with an amplifier, thereby becomes necessary.

The individual member of the public can improve the quality of his television reception by installing a larger antenna or by placing it at a higher and more advantageous location, the basic limiting factor being

only the amount of money he wishes to spend on his antenna installation and the quality of reception he will accept as adequate for this expenditure. More elaborate antenna installations and cooperative systems are common in suburbs and rural areas. Master antennas for a single building or group of buildings are common in metropolitan areas. The CATV system performs the same function as the homeowner's antenna and the connecting line to his set, the difference being that a master antenna and connecting line are made available by an entrepreneur to the set owner for a fee.

The court of appeals stated (App. A, pp. 4-5):

> The hilly terrain in and around Clarksburg and Fairmont makes reception by normal rooftop antennas of television programs broadcast by the Pittsburgh, Steubenville, and Wheeling stations difficult or impossible . . . .[5] Both the Clarksburg and the Fairmont CATV systems receive broadcast television signals by means of tall antennas on hilltops some two and a half and one and a half miles respectively from the city centers, and transmit them through coaxial cables strung along utility poles and smaller 'house drop' cables to television sets on subscribers' premises. The television signals of each station carried by a system are received by a separate antenna specifically designed and oriented to receive them.[6] The signals

[5] Fairmont is about 67 miles from Pittsburgh, 52 miles from Wheeling, and 65 miles from Steubenville; Clarksburg is about 82 miles from Pittsburgh, 57 miles from Wheeling, and 74 miles from Steubenville. JA 32 (district court opinion), 228-229.

[6] These antennas were of a common variety available in a radio store and widely used by the public. JA 208-209, 524-525, 880-881 (testimony of both parties' experts). All the reception of the signals by defendant's systems was "off-the-air"; that is, no microwave retransmission was involved.

of all the stations carried by the system are then transmitted together over its cables, without any editing or selection of programs, and the system has no way of knowing which program, if any, a subscriber has turned on. Both CATV systems carried three stations from their inception in 1952 to 1958, and five thereafter. Although there are local television broadcasting stations in Clarksburg and Weston, West Virginia, the CATV offerings attracted substantial numbers of subscribers to both systems.[7] At the end of 1963, the Clarksburg system had 9,571 subscribers and the Fairmont system 6,047. The number of subscribers of each system in 1960 was over half the number of occupied housing units counted by the United States Census of Housing in the area they served.

"Defendant, like its predecessors, is a private corporation operating the CATV systems for profit under municipal franchises. Each subscriber pays an initial charge, which is reduced if his premises are already connected to the CATV system, and fixed monthly charges.[8] Additional charges are made for connecting additional sets. Different charges, sometimes individually negotiated, have at times been established for hotels, motels, and other nonresidential subscribers. Both

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[7] Within the period covered by this action, the two "local" stations were carried by defendant's CATV systems. WBOY, located in Clarksburg, was carried by the Clarksburg system beginning in 1962, and WJPB, located in Weston (about 15 miles from Clarksburg), was carried by both systems from March, 1964. JA 39 (district court opinion), 207.

[8] The contract between defendant and its subscribers related to television "signals". It obliged defendant "to extend its Community Antenna System'. . . to make available television signals to the Subscriber at the following premises . . . ." Exs. 47, 51 and Q 2, JE 168, JE 176, JE 417. The charges under the contract were unrelated to programs viewed by the subscriber or to the subscriber's use of his television set.

the Clarksburg and the Fairmont systems have advertised the variety of stations and programming they made available, at times in connection with particular programs. Both systems conducted mail ballots among their subscribers to determine which stations they preferred to receive."

The court of appeals went on to give the following summary of the technology of television broadcasting and of the operation of defendant's systems (App. A, pp. 5-7):

". . . Television broadcasting equipment first translates the sight and sound of the program being broadcast into two voltages, the video signal, which measures the intensity of light at each spot on a photosensitive screen inside the camera as it is scanned by an electron beam, and the audio signal which measures the intensity of sound. These two changing voltages are then encoded in a radio frequency carrier wave for broadcasting; the video signal is used to modify, or modulate, the amplitude, or maximum strength, of the carrier wave, and the audio signal is used to modulate the frequency of the carrier wave. The modulated carrier wave is then broadcast by an antenna as electromagnetic radiation. When this radiation strikes a home television antenna, it induces a voltage between the antenna terminals which reproduces the modulated carrier waves. The reproduced carrier wave is then conducted into the television set, and there demodulated to yield reproductions of the video and audio signals. The video signal controls the intensity of a scanning electron beam, which reproduces on the electroluminescent interior of the television tube the image seen by the camera, and the audio signal controls the speaker of the set. Since the broadcast radiation propagates at the speed of light, the whole process of television broadcasting and reception consumes a fraction of a second.

"The radiation broadcast by a television broadcasting station, when it strikes the corresponding antenna of one of defendant's CATV systems, induces in it a reproduction of the station's modulated radio frequency carrier wave just as it does in a home antenna. The CATV system's 'head-end equipment', housed in a small building near the antennas, then amplifies the carrier wave, converts it if it is a high-frequency, or high-band, VHF wave (channels 7 to 13) to one of the low-band VHF channels (2 to 6) in order to reduce losses in transmission through the system's coaxial cables, narrows its frequency range, and then propagates it as electromagnetic radiation through the system's cables. The radiation, amplified by numerous trunkline and distribution amplifiers along the cables, is transmitted at nearly the speed of light to the terminals of subscribers' television sets, in most cases through matching transformers.

". . . Thus broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs. . . ."[9]

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[9] As the statement of the court of appeals makes clear, defendant's systems deal only with electromagnetic energy, and at no point with the sights or sounds of television programs. They do not change the sights and sounds of programs into electromagnetic energy, as the broadcasting station does, nor do they change electromagnetic energy into the sights and sounds of programs, as the television set does. Their equipment receives the broadcast carrier wave in the form of electromagnetic energy—which induces in the CATV antenna a "reproduction" of the carrier wave "just as it does in a home antenna"—(App. A, p. 6) and the equipment "then propagates it as electromagnetic radiation through the system's cables". *Ibid.* This reception and transmission of electromagnetic energy—a process likewise performed by a rooftop antenna, a "master antenna" of the kind commonly used on apartment buildings, or a "rabbit ears" antenna attached to the television set itself—is the sole activity by which defendant's systems are alleged to have "performed" the copyrighted motion pictures.

The predicted service area of a television broadcasting station is calculated, pursuant to regulations of the Federal Communications Commission, in terms of the station's "Grade A" and "Grade B" "service contours". The Grade B contour delimits that area at whose outer limits television reception of "a quality acceptable to the median observer" is expected to be available at least 90 per cent of the time at the best 50 per cent of the receiver locations.[10] That the B contour represents a useful and legal measure of a station's service area has been recognized by the F.C.C. in numerous ways.[11] Of course, acceptable reception does not end at the B contour; as one moves further out, it gradually diminishes. Indeed the Commission sought in establishing the television assignment table to afford "each station the widest coverage possible consistent with an efficient utilization of the spectrum and the satisfaction of the needs of the various cities and communities in the United States."[12]

In the present case, the relationship between defendant's CATV systems and the B contours of the five

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[10] "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90 per cent of the time at the best 70 per cent of receiver locations at the outer limits of this service. In the case of Grade B service the figures are 90 per cent of the time and 50 per cent of the locations." F.C.C. *Sixth Report and Order on Television Allocations*, 1 (part 3) Pike & Fischer R.R. 91:601, ¶ 97 (1952); see 47 C.F.R. § 73.684.

[11] One of the most recent and pertinent is the requirement of the F.C.C.'s comprehensive regulatory scheme for CATV that a CATV system carry upon request the signal of any station "within whose Grade B contour the system is located". *Second Report and Order*, §§ 66-67. See discussion *infra*, pp. 53-55.

[12] *Sixth Report and Order, supra* at n. 10, ¶ 138.

television stations was correctly stated by the court of appeals as follows: "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." (App. A, p. 21) Thus, in one-half of the ten situations presented, defendant's subscribers (and its systems) are within or on the B contour of the station broadcasting the motion pictures.

Defendant at the trial offered to prove that plaintiff, through the license fees it received from the broadcasting stations, had in fact already been compensated, not merely for the reception of the licensed broadcasts by the public as a whole, but for their reception by the specific members of the public who subscribe to defendant's CATV systems. The offer of proof included such basic economic facts of the television industry as the fact that a station's advertising rates are based on the size of its audience, and the fact that the royalties paid by the station to copyright owners such as plaintiff are likewise based on the size of the station's audience. Defendant further would have proved the inclusion of defendant's CATV subscribers in the contemplated audiences of the licensed stations, and that the royalties exacted by plaintiff from the stations hence took into account — or must be considered to have taken into account — the anticipated reception of the broadcasts by those viewers.[18]

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[18] Defendant's offer of proof was rejected by the district court (A 1321-1327), and defendant challenged the rejection on appeal. Defendant's Brief in the court of appeals, p. 101 n. 115. The court of appeals properly recognized that, since the proof had been rejected, it was necessary for purposes of the appeal to assume the accuracy of the facts asserted by defendant. (App. A, p. 17)

B. The Decisions Below

The district court, in finding the operations of defendant's CATV systems to constitute an infringing "performance" of plaintiff's motion pictures, relied principally on what it deemed to be the electronic and technological functions of defendant's equipment.[14] The court recognized that the statutory words "to perform", in their commonly understood meaning, might well fail to encompass the acts done by defendant's systems: "On the premise that words are only the means of communicating thoughts or ideas, it may be contended, with a degree of validity, that the words 'to perform', as commonly used in everyday speech by the average layman, are not intended to encompass the aggregate or composite of the acts of [defendant's systems] . . .". JA 67; 255 F. Supp. at 201. The court rejected the common meaning of the statutory language, however, in favor of a process of statutory interpretation which it described as "a judicial application of the principle of semantic extension". JA 105; 255 F. Supp. at 213, n.20.

On the question whether public reception of broadcasts licensed by the copyright owner is protected by a

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[14] "The finding that defendant's activity constituted a performance was based on an analysis of the electronic process employed in the defendant's operation. The court found the 'essential feature' of CATV's operation to be that when it received the signals from the TV station and fed them into the amplifying equipment which formed a part of its transmission system, it 'created output signals which are replicas in electronic terms of the input signals' and which 'duplicate and reproduce . . . the patterns . . . that originated from the broadcast antenna. . . .' The Court found that this process of duplication constituted an infringing performance." Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1517 (1967).

license implied in law under the Copyright Act and/or the Federal Communications Act, the district court stated simply: "The question being not whether there *is* an implied in law license to perform publicly for profit but whether there *should* be, this court holds that there should not." JA 88; 255 F. Supp. at 211. (Emphasis in original)

Having decided the issue of copyright infringement in favor of plaintiff, the district court certified that in its opinion the decision involved a controlling question of law as to which there was substantial ground for difference of opinion, and that an immediate appeal as authorized by 28 U.S.C. § 1292(b) might materially advance the ultimate termination of the litigation. JA 123. Based on that determination, the Court of Appeals for the Second Circuit granted petitioner's application for leave to appeal under 28 U.S.C. § 1292(b). JA 18.

The court of appeals, in affirming the district court's judgment, brushed aside the technological grounds on which that court had relied, stating that "the result produced by defendant's systems constitutes a public performance, and . . . the technical means by which the result is produced are irrelevant to this issue." (App. A, pp. 14-15, n. 9) The "result" which the court of appeals found crucial, and which it held to be "fairly characterized as a public performance infringing the copyrights", was "the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets" of defendant's subscribers. (App. A, p. 7) The operations of defendant's systems were held to constitute a "performance" of the motion pictures, and hence to impose infringement liability on defendant, because of "the magnitude of [defendant's] contribu-

tion" to that "result" taking place in the homes of defendant's subscribers, despite the fact that the reception and viewing by the subscribers were conceded by plaintiff to be non-infringing. (App. A, pp. 7, 10, 12, 13)

The court of appeals did not discuss the meaning of the statutory term "perform", but stated that its conclusion was reached "in light of prior decisions and of the policies of the Copyright Act . . . ." (App. A, p. 7) So far as prior decisions were concerned, the court mainly relied on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). So far as "the policies of the Copyright Act" were concerned, the only policy recognized by the court as relevant to the issue of "performance" was the Act's "fundamental purpose . . . to protect copyright proprietors against dilution of the market for their works" (App. A, p. 10)—a policy requiring, in the court's apparent view, exclusive consideration of the extent to which "a television broadcast of a copyrighted work harms the copyright holder . . . ." (App. A, p. 12)

On the issue of a license implied in law, the court of appeals recognized that "the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression". The court proceeded to deny the existence of such a license on the ground that: "In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas and audiences . . . ." (App. A, p. 19) Thus, the copyright owner must be allowed, in the court's view, "the right to limit its

licenses to viewers who can receive the broadcasts through normal rooftop antennas". (App. A, p. 20) With respect to defendant's argument that in the absence of an implied license defendant's subscribers "will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV services" (App. A, p. 20), the court responded that "Whatever force this 'double payment' contention may have, it must be made to Congress, inasmuch as it 'involves purely legislative considerations' " and does not involve any relevant policy of the Copyright Act. (App. A, p. 20)

The court of appeals went on, however, to place what might appear to be an important limitation on its holding denying the existence of a license implied in law. It sanctioned the copyright owner's right to collect a second royalty through a CATV system only where the CATV system's subscribers "could not receive the licensed broadcasters' signals satisfactorily" (App. A, p. 22) by "normal antennas" or "normal rooftop antennas". (App. A, pp. 20, 22) The court stated:

> "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work." (App. A, p. 23)[15]

[15] The court did not define a "normal antenna" or "normal rooftop antenna" nor otherwise elaborate on how its possible reservation should be applied in particular fact situations. See discussion *infra*, pp. 47-51.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW BY A NOVEL INTERPRETATION GREATLY ENLARGED THE COPYRIGHT MONOPOLY IN DISREGARD OF BOTH THE PRINCIPLES OF STATUTORY CONSTRUCTION ADOPTED BY THIS COURT AND THE PRIMARY PUBLIC POLICY OF THE COPYRIGHT ACT AND OF THE COMMUNICATIONS ACT.

This is a case of first impression on the applicability of the federal copyright laws to the service provided by a community antenna television system (commonly referred to as CATV). Plaintiff, the owner of copyrighted feature films and cartoons, licensed television stations to broadcast the films to the public. The court below ruled that defendant's two community antenna systems, by receiving the broadcast signals and making the signals available to subscribers, infringed plaintiff's exclusive right under sections 1(c) and (d) of the Act to perform the copyrighted motion pictures in public.

The decision below clearly involves an important question of federal law which has not been, but should be, settled by this Court. The decision extends federal copyright restrictions for the first time to the reception and viewing of publicly broadcast television programs by members of the American public in their own homes on their own television sets. If allowed to stand, the decision will increase the cost of television viewing for millions of Americans. It will also remold the structure of the television industry for years to come. It will place control over CATV—already an important part of the national communications system—in the private hands of the few companies that control the overwhelming bulk of television-program copyrights, and will substantially oust the control now being exercised in the public interest through regulation by the

F.C.C. Review of the decision by this Court is further in order because the interpretation of the Copyright Act by the court below is contrary to the statute's meaning and intent, conflicts with principles of construction adopted by this Court, is based on a serious misinterpretation of a decision of this Court, and—most important—contravenes important public policies embodied in the Copyright Act and the Federal Communications Act.

The nationwide importance of this case is underlined by affidavits filed on behalf of plaintiff in the trial court by two of the networks and several major motion picture companies. (R 3909-3923). Illustrative of the statements made was that of American Broadcasting—Paramount Theatres, Inc., which stated that "the instant case is of decisive importance to the television industry as a whole." (R 3909). Plaintiff has also submitted a brief (R 5268 *et seq.*) in connection with franchise proceedings in many cities throughout the country referring to this lawsuit and arguing that the cities would be jointly liable with the CATV systems for copyright infringement. In testifying as to the application of copyright to CATV systems, the Register of Copyrights stated that this issue "is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications for years to come." [16]

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[16] Statement of Abraham L. Kaminstein, Register of Copyrights, in Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (Aug. 2, 1966).

1. The Decision Below Adversely Affects Millions of Television Viewers and Affects the Future of the Television Industry

Community antennas began in 1949, virtually at the beginning of commercial television, a reflection of the fact that homeowners must provide or secure a suitable reception antenna. A broadcaster is given a license to use a public airway for "broadcasting". "Broadcasting" is defined in the Federal Communications Act as "the dissemination of radio communications intended to be received by the public . . ." 47 U.S.C. § 153(o). While the broadcaster gets what amounts to a monopoly to use a particular airway, he has no obligation to see to it that persons within range of the station are able to receive the broadcasts. It is up to each member of the public to decide what set he wishes to buy, and what antenna he will install to overcome natural obstacles which may hamper reception. Community antennas came into existence because of public demand for someone to provide an antenna service which improves reception in areas where terrain or distance make reception costly or difficult.

Recently published figures indicate that as of January 1, 1967, there are approximately 1,770 CATV systems in the United States serving approximately 6,000,000 persons in about 2,100,000 television homes.[17] The power granted to copyright owners under the decision threatens the viewing of millions of persons who presently get their television through reception on CATV systems, particularly in communities isolated

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[17] *Television Factbook*, No. 37 (1967) Services Volume, p. 54a. See *Second Report and Order*, ¶ 31. The National Community Television Association has reported that there are approximately 3,000,000 homes served by CATV.

by distance or terrain from metropolitan areas. It also is an immediate threat to the many private businessmen operating CATV systems, apartment houses with master antennas, and the many cooperative antenna systems.

The measure of the threat to the CATV industry is shown by the fact that in a single week a five-channel CATV such as petitioner's would receive well over 1,500 telecasts.[18] Conservatively, 1,000 of these telecasts will involve a copyrighted program. If the statutory minimum of $250 per infringement, claimed by respondent, is levied for each program, the statutory minimum damages would be $250,000 per week or $1,000,000 per month.[19] But this is not all. Within these copyrighted programs, copyrighted music is also broadcast. The claim for infringement of the music copyrights by such organizations as ASCAP—which filed an amicus brief supporting plaintiff in the court below—would substantially increase the potential liability. This potential liability for a single month exceeds what was paid for these systems (JA 204-205). Nationwide the past liabilty of CATV systems for the three-year statutory period threatens a take-over of CATV by copyright owners as the only means of discharging the liability. The staggering amount of this past liability makes it clear that any suggestion that

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[18] The complaint in this case alleges multiple infringements of the over 1,300 movies and cartoons involved. (R. 3342 *et seq.*; R. 3423 *et seq.*)

[19] 17 U.S.C. § 101(b) provides for recovery of damages and profits, and in the absence of proof of damages and profits, a minimum of $250 and a maximum of $5,000 for each infringement.

CATV can "absorb" these copyright charges is ludicrous.

Moreover, no organization of copyright owners exists or could be created with whom CATV operators could negotiate for licenses for the future. The CATV owner does not control or know what is to be broadcast. Published programs of television stations are frequently modified by the station before broadcast and the CATV operators could never be sure what programs would be telecast. Even if this program identification problem could be overcome, the CATV operator would have no way to identify the owner of the copyright of the program. Assuming that the owner could be identified and located, the CATV operator would be at his mercy in any negotiations since the CATV has no bargaining position. The average CATV system is not large, having approximately 1200 subscribers.[20] The only recourse a CATV operator would have in most situations in response to an exorbitant demand of a copyright owner would be to cease reception of the broadcast. If the CATV is forced to cease reception because of the excessive demands of a particular copyright owner or owners, the interruptions to the antenna service would be such that the business would soon be destroyed.

Even if one were to disregard the devastating effect of past liability, the decision below merits review by this Court because it will give the copyright owner the means of controlling reception of broadcasts for his own purposes. As Columbia Broadcasting System an-

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[20] See figures and source cited *supra*, p. 23.

nounced in its Press Release when it filed its suit,[21] it will use copyright as a means of preserving "the present system of nationwide program distribution by television networks through their affiliated stations".

The Department of Justice has pointed out that blanket extension of copyright liability to CATV systems "raises possibilities of harmful competitive consequences. . . ."[22] In the Department's view, competition would be harmed in at least three significant respects:

> ". . . First, the nature and composition of the CATV industry may be transformed should the provision be enacted. Ownership and control of copyrights is highly concentrated in the networks, movie studios and other television producers. . . ."
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> ". . . Given the power to subject CATV systems to copyright liability, the networks or the other

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[21] CBS has brought a suit against a corporation owning CATV systems charging copyright infringement in the United States District Court for the Southern District of New York, which suit is presently pending. See *Columbia Broadcasting System, Inc.* v. *TelePrompTer Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965) (CBS motion for summary judgment denied). At the time the suit was filed, the Press Release was issued (December 11, 1964).

[22] Statement of Acting Assistant Attorney General Edwin M. Zimmerman in Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., (August 25, 1966) This statement on behalf of the Justice Department was delivered in opposition to a proposal in a copyright-revision bill before the Subcommittee which would have brought about an "explicit and blanket extension of copyright liability to CATV systems" (*id.*), thereby achieving the same result as the decision below in this case.

large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves. . . ."

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". . . Moreover, were the copyright owners to achieve control of a substantial portion of the CATV business, they could impede entry of other independent operators into the field by refusing to allow such poteptial competitors to carry their programs. . . ."

* * * *

". . . A second possible anticompetitive development could arise if Congress or the Federal Communications Commission should decide to allow CATV systems to originate their own programs. CATV then could compete with existing networks, providing an additional market for program producers and an important channel for reaching the viewing public apart from the existing major networks. Assuming the potential development of such competition, it would be clearly undesirable to allow networks to use their ownership or control of program copyrights to extend their power into ownership of CATV facilities, or to limit the independence of CATV operators. . . ."

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". . . Finally, CATV systems run a second communications cable into each house that they serve. This cable may in the future also provide access to many new electronic services industries. If . . . a few large copyright holders directly or indirectly [to] control this second wire, it may discourage the development of competition in these prospective industries."

What is at stake here is not merely the conflicting private interests of two groups of businessmen. The

decision below, if allowed to stand, will affect the public interest not only by increasing the cost of television viewing for millions of Americans but by controlling the structure of the television industry for the indefinite future.

2. The Decision Extends the Performance Monopoly in a Novel Manner

The court below ruled that defendant's CATV systems were infringing the performance monopoly because the "result brought about by" their activities could be "fairly characterized" as a public performance within the monopoly (App. A, p. 7). The "result" was "the simultaneous viewing" of plaintiff's motion pictures on the subscribers' own home television sets (admittedly not an infringement).

The court below made it perfectly plain that "the technical means by which the result is produced are irrelevant" to it ruling (App. A, p. 15, n.9), and that, in its view, CATV systems "perform" copyrighted works no matter what equipment is used.

Copyright is a "wholly statutory"[23] limited monopoly based on two policies. The primary policy of the limited monopoly granted by Congress is "to induce release to the public of the products of . . . [the author's] creative genius".[24] The court below did not even mention this primary policy but instead focused on reward to the copyright owner although this Court's

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[23] *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 15 (1908).

[24] *U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

decisions make it plain that "reward to the owner [is] a secondary consideration" under the Copyright Act. *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954). Moreover, the words of the Act, this Court has decided (in construing the term "copy" in the Act), should be construed in the light of their "ordinary signification" and "ordinary sense".[25] The court below, however, turned away from both these policy considerations and the principles governing interpretation of the language of the Act as announced by this Court.

Conceding that "no legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's" (App. A, p. 7), the court of appeals found one case on which it thought it could base its ruling, *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191 (1931).

We submit that the court misread the *Jewell-LaSalle* case. There the issue arose from

> "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of radio receiving sets and loudspeakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station" (*id.* at 195-196).

This Court held that the hotel's providing an audible rendition for its guests on equipment provided by the hotel constituted a performance within the meaning of

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[25] *White-Smith Music Publishing Co.* v. *Apollo Co., supra,* n.23, at pp. 12, 16.

section 1(e) of the Act.[26] The opinion emphasized that the hotel had produced the music "by instrumentalities under its control" and pointed out that the rendition on the *hotel's* equipment was a substitute for the hotel's engaging an orchestra (*id.* at p. 201). The opinion concludes that "the reception of a radio broadcast and *its translation into audible sound*" constituted "essentially a reproduction" (*id.* at 199-200), which "amounts to a performance" (*id.* at 201).[27] (emphasis supplied)

The *Jewell-LaSalle* interpretation of "performance" is consistent with the "ordinary sense" rule of construction adopted by this Court in the *White-Smith* decision; the hotel's activities were within the common meaning of a "performance"—an audible rendition of the work was provided to the public in the hotel. Here, in contrast, it is conceded that the programs never became audible or visible on defendant's systems; they

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[26] It should be noted that the broadcast of the musical composition by the radio station had not there been authorized by the copyright proprietor. *Jewell-LaSalle* specifically reserves the issue whether a license might have been implied as a matter of law if the broadcast had been authorized (*id.* at n. 5). The court below recognized that the issue as to an implied-in-law license to receive was "one of appellate first impression" (App. A, p. 17). *Cf. Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y. 1937). See discussion *infra*.

[27] The question certified to this Court specified the fact that the hotel proprietor had made available "the hearing" of the song (*id.* at 196). In *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y. 1937), the hotel had installed a master receiving set as in *Jewell-LaSalle* which was connected to loudspeakers in each room. It was stipulated that a witness had checked into the hotel and listened to the broadcast song, 19 F. Supp. at 3-4.

are audible or visible only in the homes of subscribers when the subscribers chose to turn their own sets on.[28]

As a limited monopoly granted by Congress in derogation of the general policies against monopolies, the copyright statute "ought to be reasonably construed with a view to effecting the purposes intended by Congress" and "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred . . . ." *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346 (1908). There is nothing to indicate that Congress intended the statutory word "perform" to have other than its "ordinary signification", a rendition of the work that was audible and visible to observers.

The court below concluded that the "nub" of the *Jewell-LaSalle* decision was—"how much did the defendant do to bring about the viewing and hearing of a copyrighted work" (App. A, p. 10). Nothing in the *Jewell-LaSalle* case or any other decision of this Court supports the creation of this contributive concept of "performance", particularly where it is created to achieve a sweeping enlargement of the "performance" monopoly granted by Congress. In *Jewell-LaSalle* the hotel produced the audible music on its own instrumentalities; there was no standard of "contributing"

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[28] Compare *Canadian Admiral Corp.* v. *Rediffusion, Inc.,* [1954] Can. Exch. 382. The district court erroneously relied on this case as establishing performance by CATV reception (R. 92a). In fact, the Canadian case involves a "rediffusion system", not a CATV system; the Canadian systems, as the Canadian Court emphasized, owned and furnished the sets ("complete terminal units") to the subscribers. The Court ruled that the service provided by the rediffusion system to home television viewers was not an infringement, and that the image in the homes on these terminal units was a private, not a public, performance. *Id.*, pp. 401, 402.

relevant to the performance by the hotel. Nor can the decision below find any support in the doctrine of contributory infringement. In the present case, in contrast to *Jewell-LaSalle,* both the broadcasting and the viewing are conceded not to be infringing. Under the decision below, defendant's reception of the authorized telecast and transmission of the signals resulted in "bringing about" viewing by subscribers, which was conceded to be non-infringing. Thus, what the court held to be "fairly characterized as a public performance" was not the acts done by defendant's systems, but rather the acts done by defendant's subscribers: their "simultaneous viewing" of the motion pictures in their own homes on their own television sets. If "the result brought about by one of defendant's CATV systems" is concededly a noninfringing one, it is impossible to understand how defendant's systems can be held liable for infringment on the ground that they bring about that result.

The *Jewell-LaSalle* case, decided 37 years ago, dealt with a special situation not present in this case: an unauthorized broadcast was used by the hotel on its loudspeaker equipment in lieu of hiring an orchestra. (283 U.S. at 201) The decisions below erroneously attempt to distill from this opinion a principle dealing with facts not involved in the *Jewell-LaSalle* opinion. It is appropriate for this Court, therefore, to review the decisions below and to reconsider the distorted meaning which those decisions have given to the opinion in *Jewell-LaSalle.*[29]

[29] If we are wrong and *Jewell-LaSalle* does compel the result and the doctrine of "performance" announced by the court below, then we would respectfully suggest that this Court may deem it appropriate at this time to reconsider *Jewell-LaSalle.*

3. Mere Transmission of Electromagnetic Energy by a CATV Which "Contributed" To Viewing on Subscribers' Own Sets Produced Non-Infringing Private Performances in the Homes, Not a Public Performance by the CATV

The district court pointed out that "performance" has "in common parlance" three elements: an actor, a work to be performed, and an audience to see and hear (JA 70, 71). The court acknowledged that "the words 'to perform' as commonly used in every day speech by the average layman" do not encompass the operation of a CATV—the reception of broadcast signals and the transmission of those signals without converting them into sight or sound (JA 67). However, by a process of interpretation, which it called "a judicial application of the principle of semantic extension" (JA 105, n. 21), the court adopted an "expanded scope of the concept 'to perform' " to cover mere transmission of electromagnetic energy (JA 93).

The court of appeals rejected the technological analysis on which the district court based its opinion. It did not examine the meaning of the word "perform", although the court's reasoning is based on the premise that sight and sound are an essential ingredient of performance. The court found the sight and sound in the "viewing" by the subscribers. Defendant's "performance" was its contribution to the viewing. But it is clear that the viewing by subscribers in their homes is a private performance and is conceded to be non-infringing. Viewing by homeowners on their own sets may be multiple private performances but no case has suggested that these non-infringing private perform-

ances are public performances.[30] To reach the conclusion that defendant's contribution to that viewing constituted a "public performance", the court turned to an analogy of CATV and a broadcaster, an analogy unsound in fact and invalid in law.

While the court below rested its decision of the "performance" issue indispensably on *Jewell-LaSalle,* it also made an argument to the effect that defendant's CATV systems must have "performed" the motion pictures because broadcasting stations are held to perform copyrighted material embodied in the programs they broadcast, citing *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), *cert. denied,* 269 U.S. 556 (1925). The court then argued that the "performance" by the broadcaster cannot take place in the broadcasting studio—as the cases in fact held [31]—because the visible or audible rendition of the copyrighted work that typically takes place in the studio may be dispensed with in the case of "the broadcast of taped and relayed programs or, usually, of motion pictures." (App. A, p. 12) Finally, the court was faced with the ultimate facts that broadcasting has a unique status under the Copyright Act and the Federal Communications Act—for example, the broadcaster has a duty under the Communications Act to select and originate programs, and

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[30] The *Canadian Admiral* case, *supra,* n.28, held that the private performances in the home did not "solely because of their numbers . . . become public performances". [1954] Can. Exch. at 408. See also *Nimmer on Copyright* § 107.42 at 412 (1967).

[31] See pp. 35-36 and n.32, *infra.*

public performance "by broadcast" is expressly recognized by the Copyright Act—and that a CATV system is in no respect a broadcaster. The court's response at this point was to drop the broadcaster analogy and switch back to its basic reliance on *Jewell-LaSalle*:

> "But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. . . ." (App. A, p. 12)

The theory that CATV systems "perform" because broadcasting stations do is no more tenable than the reliance on the hotel in *Jewell-LaSalle*. The answer to the broadcasting theory begins with the original and archetypal broadcast, which involves a "live" rendition of the work arranged by the broadcaster in his studio. In such a case what takes place in the studio is audible and visible and clearly a "performance" within the meaning of the Act. This was the situation in the leading *Remick* case, *supra*, p. 34, cited by the court below. The copyrighted music there had been played "live" in the broadcaster's studio, and the question considered and decided in the affirmative was not whether the broadcaster had performed the music—he obviously had—but whether the broadcast had made the performance "public". Other cases dealing with the "public performance" liability of broadcasters consistently confirm this interpretation that the work is "performed" in the studio and that the broadcast—the broadcaster's dissemination into the air for reception by the public of the broadcast waves into which he has converted the sights and sounds of the work—con-

stitutes the means by which that performance is made public.[32]

The imposition of "public performance" liability on the broadcaster was supported, of course, by the consideration that the radio or television broadcast served as a substitute for a "live" performance of the work in a concert hall or theater which the members of the public receiving the broadcast might otherwise have attended, and for which the copyright owner would have received a "performance" royalty as intended by Congress. If the copyright owner could not collect a royalty from the broadcaster, he would have received no payment at all for the public's reception and enjoyment of the broadcast work.

Once the broadcaster's liability for a "public performance" was recognized in the case of "live" broadcasts, it followed naturally that the same result should be reached in cases where the broadcaster dispenses with the live performance in his studio and substitutes the playing of a record, tape, or motion-picture film, or a program supplied to him (usually through telephone lines or microwave transmission) by a "network." Although the technical methods employed have changed, all relevant considerations support the same

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[32] The interpretation is clearly stated by several British Commonwealth cases which cite and rely on the *Remick* v. *American Automobile Accessories* decision. *Messager* v. *British Broadcasting Co.*, 2 K.B. [1927] 543, 548, *rev'd on other grounds*, 1 K.B. [1928] 660, *aff'd*, [1929] A.C. 151; *Chappell & Co., Ltd.* v. *Associated Radio Co. of Australia, Ltd.*, [1925] Vict. L.R. 350, 351-52, 358, 362. See also *Mellor* v. *Australian Broadcasting Commission*, [1941] A.C. 491, 500. See also *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829 (S.D.N.Y. 1926), cited by the court below. App. A, p. 11, n.6.

result.[33] The Act expressly recognizes that the playing of a record, film, or tape on which the copyrighted work is recorded constitutes a "performance" of the work.

The essential fact remains that whether the broadcast is "live" or from tape, or film, or a program supplied by a network, the broadcaster is still selecting, originating, and procuring the programs that he broadcasts to the public—functions for which he is legally responsible, and which he cannot delegate, under the Federal Communications Act.[34] So far as the broadcaster is concerned, when he decides to obtain his program material from tape or film, or a network, he is substituting this method of program origination for the live performance that he would otherwise have staged in his studio.

The rule that a "broadcast" constitutes a "public performance" is expressly confirmed by the language of section 1(c) of the Copyright Act, as amended by Congress in 1952 (66 Stat. 752).

Of the various characteristics peculiar and essential to the broadcast function that produce the broadcaster's "public performance" liability, not one is applicable to defendant's CATV systems. They are in no respect engaged in "broadcasting."[35] They do not select, originate, or procure programs. They do not convert

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[33] In fact there is an audible and visible rendition of the program in the broadcasting studio—at least on the "monitors" that are employed as a necessary part of the station's equipment. See JA 824-826.

[34] 47 C.F.R. § 73.658(e).

[35] It is settled that a CATV system is not a broadcaster. *In the Matter of Inquiry Into the Impact of Community Antenna Television Systems, etc.*, F.C.C. Docket No. 12,443, 18 Pike & Fischer R.R. 1573, ¶¶ 65-67 (1959).

the sights and sounds of programs—whether in the form of a live performance or of information stored on records, tape, or film—into electromagnetic waves for transmission through the air to the public.

By disregarding the fundamental differences between CATV and broadcasting, the court below disregarded the teaching of *White-Smith* against the extension of the scope of the monopoly by judicial construction to new areas or businesses not existing at the time of the statutory enactment and not clearly within the Congressional intent. The "anticompetitive consequences" of that extension, a matter surely relevant to a consideration whether a limited monopoly should be enlarged to give control of a new business to the copyright owner, was pointed out by the Department of Justice (*supra*, pp. 26-27).

4. The Decision Below Disregards the Primary Policy of the Copyright Act and of the Communications Act

The court below justified its interpretation because of the "harm" to the copyright owner from the viewing by the subscribers since this viewing is a "dilution of the market" and would disrupt the owner's exploitation of the territorial areas of permissible public reception which he establishes (App. A, pp. 19-20).[36] But this is to make the meaning of the statutory word turn on supposed harm or benefit to the copyright owner in his method of exploitation rather than on the "ordinary" and "normal" meaning of the words of the law. Moreover, it overlooks the fact that the copy-

[36] This Court rejected the argument that what "harms the copyright holder" is the test of infringement under the Copyright Act. *White-Smith Music Publishing Co.* v. *Apollo Co.*, *supra* n.23, at p. 18.

right owner has received his award from the broadcaster.

The copyright owner has received his payment—his reward—for licensing the release of the broadcast which as a matter of law must be "intended to be received by the public". (47 U.S.C. § 153(o)) It is settled that CATV is not a broadcaster;[37] indeed, its operations differ fundamentally from a broadcast station. A broadcaster's function is to originate programs, and he pays the copyright owner for the right to telecast the program he selects so that he can sell commercials in connection with the telecast program. The copyright owner has received his reward for the release to the public which the station as a matter of law intends to serve when it makes its broadcast.

The court below focused on protecting the copyright owner without regard to the fact that it was unnecessary to construe the "performance" right in such an expansive manner in order to provide a "reward to the owner" of the copyright,[38] and indeed that its construction gave him a double reward for the same performance. Because of the economic structure of the television industry, the royalty which plaintiff extracted from the television station for the broadcast of his copyrighted works took into account or could have taken into account the presence of defendant's CATV subscribers within the public which makes up the station's audience. This payment to the copyright owner,

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[37] *In the Matter of Inquiry, etc.*, F.C.C. Docket No. 12,443, *supra* at n.35.

[38] The district court likewise relied exclusively on the policy of "protecting the copyright proprietor's performance monopoly" (JA 72) without regard to any other policy of the Copyright Act.

under our system of television, is borne by the public who patronize the advertiser.

As defendant offered to prove (JA 1319-24), the economics of television stations are related to coverage, *i.e.*, evidence of reception. The amounts which stations pay for programs to telecast and the rates which advertisers are charged for advertising over the station are both related to the size of the audience, the coverage of the station. The standard measure of television coverage are reports by rating services such as Neilsen and American Research Bureau (ARB).[39] Defendant's subscribers were included by the rating services within the coverage of the stations here involved, and that coverage was advertised by the television stations involved. Indeed, plaintiff used the rating-service coverage of certain of these films and of these stations, including Clarksburg and Fairmont, in its own advertising.[40] Thus the audience for the broadcast which plaintiff licensed included defendant's subscribers.

The decision below authorizes the extraction of a second payment—a second royalty—for the same broadcast. Although the copyright owner had already been compensated by the broadcaster for the reception of the broadcast, he can now impose an additional charge on those in the station's service area who choose to subscribe to the reception service provided by a

[39] The F.C.C. in its *Second Report and Order* used the ARB rating service to determine the size and rank of television stations in its so-called top-100 market regulation. (¶ 141)

[40] The coverage of television stations as shown by the rating services is published in standard reference works such as *Television Factbook*, published by Television Digest. These sources demonstrate the inclusion of defendant's subscribers in the audience of the stations plaintiff licensed to telecast. See, *e.g.*, *Television Factbook* No. 35 (1965) pp. 548-b, 546-b, 707-b, 494-b, and 544-b.

CATV. Accordingly, the court's decision sanctions the result, in conflict with the principles of the Court's decision in *Aro Manufacturing Company* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964), that the copyright owner can restrict and charge for the public's enjoyment of television broadcasts, even though it has extracted, through the broadcaster, a royalty attributable to that public's viewing of the telecast (App. A, pp. 20-21). The court below sought to avoid the *Aro* decision by asserting that the "double payment" was a legislative matter for the Congress, but *Aro* teaches that this consideration of double payment is not only relevant but perhaps determinative in the interpretation of the Copyright Act. This case squarely poses the question as to how many royalties the copyright owner may extract for the same broadcast to the same public.

The mechanism by which the court below permitted the collection of the second royalty is itself a significant expansion of the copyright monopoly. The court explicitly sanctions territorial zones by copyright licenses.[41] Although no case has previously gone this far, the court below would permit a copyright owner to use a copyright license to draw territorial lines around broadcasting stations whenever and wherever in his judgment this would increase his reward, or enable him to achieve other business objectives.[42] The

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[41] Apparently the copyright proprietor's zones will supplant the regulatory authority of the F.C.C. under 47 U.S.C. § 303(h).

[42] The court below characterized the issue as "divisibility of the copyright owner's exclusive right to perform" and stated that "it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences * * *". (App. A, p. 19)

possibility of such territorial divisions is not speculative. The plaintiff has attempted to draw such lines in its licenses which purport to limit the station's license to telecasting within the Grade A coverage contour of the station. (Ex. O, clause Twenty-Fifth, JE 343) Moreover, it has asserted in its form contract the right to prevent the public from utilizing the service of a community antenna. (*Id.*, clause First and Twenty-Fourth JE 340, 343)

The "anticompetitive consequences" are a relevant consideration in determining whether an expansive interpretation is to be given to the statutory copyright monopoly. Ownership of copyrights in television is highly concentrated.[43] The economic power to control television through control over programs through copyrights, pointed to by the Department of Justice (quoted *supra*, p. 26) would be greatly enhanced by the extension of the copyright monopoly to permit territorial lines of permissible public reception to be drawn by use of the copyright monopoly.[44]

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[43] See testimony of respondent's President that the 14 companies for whom he was speaking represented "in excess of 75 per cent of the copyright material which is going over the airwaves today". Hearings on H.R. 4347 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., p. 1332 (1965). See also Statement of Department of Justice quoted *supra* at p. 26.

[44] The court below recognized the potential for territorial restrictions but seemed to think it important (App. A, p. 19, n.12) that defendant had not argued that agreements between copyright owners and stations fixing territories of authorized reception violated the antitrust laws. The fact that defendant did not anticipate that the court would adopt a novel interpretation which explicitly sanctioned territorial division does not change the fact that the court has created a new instrument of economic control over broadcasting and reception.

By its focus on enhancing the reward of the copyright owner, to the exclusion of the primary public policy of inducing release to the public, and by its disregard of the monopolistic consequences of enlarging the limited monopoly, it has opened the way for copyright to be used to set up zones of reception and to fix territories in a way contrary to the principles announced by this Court in *U. S.* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453, 456 (1873).[45]

5. The Erroneous Interpretation Results in an Uncertain and Enlarged "Performance" Monopoly

This novel and expansive construction of the exclusive performance right raises serious questions as to the scope of the copyright monopoly in radio and television broadcasting and reception. Since the "technical means" and equipment used are irrelevant (App. A, p. 15, n. 9), there could be infringement of the monopoly whenever simultaneous viewing by the "public" is a "result produced" by a person's actions, depending upon the "magnitude" of the person's "contribution". The scope of this vague standard of "public performance", and the potential extension of the copyright owner's restrictive power over the television reception under this construction, is, to say the least, uncertain.[46] Many persons and services contribute to

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[45] See Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1527-29 (1967). See also discussion *infra*, pp. 45-46, on implied license.

[46] The vagueness of the rule announced by the court below raises questions for a court applying the doctrine in a given case as to whether a defendant "did far more" (App. A, p. 10), or "so much" (App. A, p. 11), or simply "more" (App. A, p. 13) than another defendant in another case might have done to "bring about the viewing and audition of plaintiff's copyrighted motion pictures" (App. A, p. 13).

or produce the "result" of a simultaneous viewing of television programs by members of the public.[47] Apparently, under the court's rationale, a person performs in public where he contributes to a number of simultaneous private performances. The court's decision poses the anomaly that although the individual homeowner could take such steps as he wishes to install an adequate antenna of his own without infringment, an entrepreneur may not supply an antenna service to a number of homeowners so that they may watch the performance in their homes.[48] Thus, the owner of any antenna serving more than a single home or a single apartment is engaged in "public performances".

By bringing cooperative antenna systems and those who would supply master antenna services to the public (and perhaps others supplying equipment and services which produce the "result" of viewing television programs) within the performance monopoly, the decision of the court below would permit the copyright proprietors to restrict and impose a toll for the reception by a substantial segment of the public.

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[47] *E.g.*, public utilities providing electric power used to operate television sets; common carrier lines between network facilities and television stations; manufacturers of television sets, and particularly various types of master antenna systems. Many apartment houses in urban areas provide a master antenna service to tenants identical to that provided by defendant's CATV systems (JA 902-904); since these do as much as a CATV system to bring about the simultaneous viewing of programs by a number of persons, presumably the apartment house "performs" the copyrighted programs "in public" under the court's decision.

[48] It should be noted that section 1(d) of the Act does not contain any requirement that a public performance be for profit, so that the profit aspect of petitioner's business is irrelevant to copyright infringement.

6. The Court Below Rejected the License Implied in Law Under the Copyright Act and the Communications Act To Receive Authorized Broadcasts

A substantial part of the court of appeals' opinion dealt with petitioner's contention that, even if its CATV systems did publicly "perform" when they received and made available television signals to subscribers, they had a license implied in law to provide their service to the public where the copyright owner had authorized the broadcast. Characterizing the question, mentioned but left open by the footnote in the *Jewell-LaSalle* decision (at p. 199, n. 5), as "one of appellate first impression", the court below ruled that defendant's CATV systems had no such license implied in law and stated that it saw "no reason to deny plaintiff the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas", other than possible questions under the Federal Communications Act. (App. A, p. 20) After discussion of the Communications Act, it concluded that "at least where defendant's subscribers could not receive the licensed broadcaster's signals satisfactorily by normal antennas, the Federal Communications Act * * * was not intended to preempt the application of the Copyright Act". (App. A, p. 22)[49]

There is no authority for any restriction on reception in the language of the Communications Act. Broadcasting is defined to mean "dissemination of

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[49] The court went on to state that: "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas . . . ." (App. A, p. 23)

radio waves intended to be received by the public".[50] There is nothing in the Act to suggest that "the public" means some arbitrary segment of the public at large determined at the will of the copyright proprietor.[51]

When the copyright owner decides to use broadcasting for exploitation of his work, and authorizes a performance of the work to the public through a broadcast, he subjects his limited monopoly to the statutory scheme of broadcasting. Under that scheme a public resource — the frequency spectrum — is licensed to broadcasters, who are obligated by their licenses to provide service to the public. Broadcasting is supported by advertising and the public pays the costs (including copyright fees) indirectly through the costs of products advertised. Since the public is intended to receive and enjoy the broadcast together with the associated advertising, and the copyright owner has been paid his royalty for the performance, he must be deemed to have licensed public viewing of the performance free from additional copyright charges. And if public reception of the authorized broadcast is legitimate, then the public should be free without risk of infringement to go to entrepreneurs (such as defendant) to secure equipment or an antenna service without being subjected to restrictions or a second charge by the copyright proprietor. *Cf. Aro Manu-*

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[50] Section 3(o) of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 153(o) (1964).

[51] As was stated by the floor manager of the Federal Radio Act of 1927 (Senator Dill): "First, and most important of all, radio in the United States is free. It is so free to the listener-in that anybody anywhere may listen in to any broadcasting whatsoever * * *." 67 Cong. Rec. 12335 (1926).

facturing Company v. *Convertible Top Replacement Co.*, 377 U.S. 476, 495, 498-500 (1964).[52]

7. The Decision Below Denies the Right To Receive Authorized Broadcasts Within the Service Area of the Broadcasting Stations as Measured Under F.C.C. Regulations and Substitutes a Novel and Unworkable Test of the Public's Right To Receive

The F.C.C. has specific authority "to establish areas or zones to be served by" a station (47 U.S.C. § 303 (h)) and has adopted criteria for predicting the area within which service (acceptable reception) should be available from any given television station. These areas (referred to as Grade A and Grade B contours) are defined by the F.C.C. regulations,[53] and are relevant in considering the allowable range of broadcasting.

The "B" contour is the area at the "outer limits" of which "acceptable" reception is expected to be available for "at least" 90 per cent of the time at 50 per cent of the receiver locations. The F.C.C. has recognized the "B" contour in connection with a station's contemplated range or service area. A recent recognition is the requirement in the Commission's CATV rules that a CATV system carry upon request the signal of any station "within whose Grade B contour

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[52] Since subscribers to the CATV system specifically request and contract for the service provided, subscribers would potentially be liable for contributory infringement if the CATV systems are finally held to be direct infringers. And restrictions and charges imposed by the copyright proprietors on the CATV systems' operations will obviously affect the subscribers' viewing and the cost of the service to subscribers.

[53] See discussion *supra* p. 15.

the system is located".[54] The same Grade "B" contour is widely used in advertising by the stations to show coverage. The B contour does not mark the outer limit of reception. Acceptable reception occurs beyond the B contour with percentages of locations having acceptable reception gradually diminishing.

Clarksburg and Fairmont are, in half the ten system-station situations, within the grade B contours,[55] and in the other situations are sufficiently close to the B contour to leave no doubt that some areas would have acceptable reception. The undisputed testimony makes clear that there are such locations in both Clarksburg and Fairmont. (JA 272-277, 907-914, 1198-1200, 1230-1232, 1239). Nothing in the law of broadcasting suggests that such viewing or reception by the public is illegal or improper. On the contrary, prior to the decision below, there had been no suggestion that the public was restricted in any way in the antenna it could erect or use for reception.[56]

The court below disregarded this accepted system of determining a station's service area on the ground that the B contours are predicted areas of reception on smooth terrain and that actual reception may vary from the prediction. On these facts the court erected a negative test as to when the public's license to receive did not exist. No such license could be found,

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[54] *Second Report and Order*, ¶¶ 66-67.

[55] See discussion p. 16, *supra*.

[56] Although the F.C.C. has been granted specific authority to regulate transmitting antennas of broadcasting stations (47 U.S.C. § 303(e)), there is no provision in the Act granting authority to regulate or prescribe the nature of receiving antennas which the public may use.

the court said, where defendant's subscribers did not receive "satisfactorily" by "normal antennas" (App. A, pp. 22, 23). This test which the court proposes to substitute for the F.C.C. sanctioned "B" contour measure of service is novel, unclear and unworkable.

What is "satisfactory" reception? A quality of picture may be acceptable to some but not others. The court gave no hint as to what standard of "satisfactory" is to be adopted.

The court refers to a "normal antenna".[57] But this is also a novel concept undefined in law or regulation. In another context the court refers to a "normal rooftop antenna". But in many areas it is common to have the antenna on a pole or tree. Does this make the antenna non-normal?

Nor did the court below give any hint as to the measure of reception necessary to imply a license to receive. Is it enough if there is one person in the community who can receive on a rooftop antenna? Is it sufficient if 1% of the public can receive; 10%? 15%? What if, as in Clarksburg and Fairmont, there is reception on high ground but not in the valley?

Does the test of the court below require the public to receive all of the stations carried on the CATV system equally well? What if some stations are received in some parts of town and other stations in other parts of town?

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[57] Defendant's antennas are "normal" in the sense that they are standard antennas which could be bought in a radio store. (JA 208-209, 524-525, 880-881) While these "normal" antennas are installed on a tower or telephone poles on hills, the broadcasts are received off-the-air just as a "normal rooftop antenna" would receive; no microwave is involved.

Petitioner would emphasize that the reception in question by defendant's antennas was off-the-air. No microwave relay systems were involved. In the court below the respondent conjured up images of disruption in the television industry if the public was held to have a license-in-law to receive. It was argued that such a license for public reception would permit microwaving of programs across the nation. Of course, no microwave relay was involved in this case, but more important, the F.C.C., by its regulations now controls all use of microwave systems by CATV.[60] Supposed abuses by use of microwave to transmit signals long distances are within the regulatory jurisdiction of the F.C.C., and the F.C.C.'s regulatory scheme deals with and eliminates the dangers supposed by respondent.

Plaintiff also argued that if the public had an implied license to receive, a broadcasting station could rebroadcast other station's programs with impunity. This fear is without substance. Congress had foreseen the possibility of rebroadcasting and specifically provided in § 325(a) of the Federal Communications Act that no station may rebroadcast another station's signals without the consent of the originating station. (47 U.S.C. § 325(a)).

The court below has cast loose from the moorings provided under the Communications Act for determining the service area of a station. It has also disregarded the fact that the subscribers were included as an economic matter within the viewing audience of the stations.[61] To substitute for these standards the court

[60] 47 C.F.R. §§ 21.710-21.714, 91.557-91.561.

[61] See discussion, pp. 16, 40, *supra*.

has injected by interpretation of the Copyright Act a new test of reception never before used or referred to. Nothing in the Copyright Act or the communications law warrants this interpretation.

8. The Decision Below Conflicts With F.C.C. Regulations

The only restriction in the Communications Act on the use of public broadcasts is section 325(a) which prohibits "rebroadcasting" of a station's signal without its consent. (47 U.S.C. § 325(a)) This prohibition applies only to rebroadcasting and does not apply to CATV since it is clearly established that the operations of a community antenna system do not constitute rebroadcasting.[62]

In its *Second Report and Order* the Commission adopted a comprehensive regulatory scheme for CATV operations. Emphasizing that CATV systems "have arisen in response to public need and demand for improved television service and perform valuable public services in this respect" (*id.* ¶ 47), the Commission adopted elaborate and flexible rules to meet the problems raised by CATV operations.

As part of its regulatory scheme the Commission imposed the "carriage rule" under which CATV systems are required to carry the signals of all television stations within whose Grade B contour the system is located (*id.* ¶ 66-67, 47 C.F.R. § 74.1103(a)). The regulations also include a licensing scheme and other requirements designed by the Commission in the light of its views of national communications policy.

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[62] *In the Matter of Inquiry*, etc. F.C.C. Docket No. 12,443, *supra* at n. 35, ¶¶ 65-67.

The Commission, in contrast to the court below, views reception within the B contours as the norm to be expected, by making the compulsory carriage rule applicable to such stations. The F.C.C. stressed that under its rules "with possibly only the rarest exceptions, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue". (*Id.* at ¶ 151).

Neither the *Second Report and Order* nor other regulations purport to restrict the public's right to use any antenna or reception equipment it chooses for reception within or outside the Grade B contour. Nor does the Commission prohibit CATV operations outside the Grade B contour. Indeed, the regulations specifically establish administrative procedures respecting CATV reception beyond the Grade B contour (*id.* ¶ 139 *et seq.*, 47 C.F.R. § 74.1107).

In five out of the ten station-system situations in the present case, the system is within the B contour of the station involved; and the system is near the B contour in the other instances. Where a system is within the B contour it would be subject to the F.C.C.'s mandatory carriage requirement. Reception of other stations would be subject to the other rules including the rules as to priorities on reception.

The court below rejected the Commission's B contour view of expected (and, under the CATV regulations, mandatory) CATV reception on the basis that the contours are "mere theoretical estimates" from which "the true coverage may vary greatly" (App. A, p. 22, n. 14, citing 47 C.F.R. § 683(a)). It instead took the view that the copyright proprietor could, despite the regulation's requirements, restrict and impose a toll for public reception by CATV systems of stations

whose B contours covered the system wherever there was no reception with "normal rooftop antennas".

In contrast to the F.C.C.'s carefully considered approach to what it regarded as a difficult regulatory problem, the court below, by a novel extension of the Copyright Act, would impose a rule of infringement liability. If sustained, this rule will upset the balance now existing under the F.C.C. regulation between CATV and the broadcasting industry. The F.C.C. has recognized that "if the copyright suits are decided adversely to the CATV industry, we may . . . have to revise our rules" *Second Report and Order,* ¶ 108. The F.C.C. has expressed the judgment that its rules

> "represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest 'in the larger and more effective use of radio'. (Section 303(g)) [of the Communications Act]" *Second Report and Order,* ¶ 109.

What the F.C.C. requires the CATV systems to do under its rules would, under the decision below, make the system liable for copyright infringement. Since the systems are required to carry the local stations signal—compulsory carriage in the "B" contour—the CATV is caught between requirements of the law and the copyright proprietor's demands. If the reception is an infringement, the result would be to frustrate a key element of the regulatory scheme. This result is in clear conflict with the principles of this Court's decision in *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). There the Court resolved a conflict between a statutory requirement and a civil liability by finding an implied immunity in the statute. Petitioner submits that, to avoid obvious conflict with the Commission's regulatory plan and the *WDAY* decision,

the license to receive must clearly extend at least to the B contour.

CONCLUSION

This Court is here presented with consideration of the novel question whether the copyright statutory monopoly is to be enlarged by interpretation to grant to copyright owners sweeping control over reception of broadcasts by the public or whether the statute should be construed in accordance with normal rules of construction and in accordance with the primary public policy of the Copyright Act and the Communications Act. This novel question which could, in the words of the Register of Copyrights, "affect the course of radio and television communications in this country for years to come", commends itself to a determination by this Court.

Respectfully submitted,

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Dated: September 15, 1967

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 256—September Term, 1966.

(Argued January 9, 1967 Decided May 22, 1967.)

Docket No. 30767

UNITED ARTISTS TELEVISION, INC.,
Plaintiff-Appellee,

—v.—

FORTNIGHTLY CORPORATION,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

SMITH and KAUFMAN, *Circuit Judges.*

Interlocutory appeal by defendant under 28 U. S. C. § 1292(b) from a decision of the United States District Court for the Southern District of New York, William B. Herlands, *J.*, that two community antenna television systems owned by defendant infringed plaintiff's exclusive right to perform in public copyrighted motion pictures broadcast by television stations under licenses from plaintiff by receiving the stations' television signals and transmitting them by cable to their subscribers.

Affirmed.

LOUIS NIZER, New York, N. Y. (Gerald Meyer, Gerald F. Phillips, Herbert N. Bobrow, John J. Daly, Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), *for plaintiff-appellee.*

ROBERT C. BARNARD, New York, N. Y. (R. Michael Duncan, Stephen R. Barnett, Cleary, Gottlieb, Steen & Hamilton, New York, N. Y., and E. Stratford Smith, Smith & Pepper, Washington, D. C., on the brief), *for defendant-appellant.*

HERMAN FINKELSTEIN, New York, N. Y. (Simon H. Rifkind, Jay H. Topkis, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N. Y., on the brief), *for American Society of Composers, Authors and Publishers, Amicus Curiae.*

ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL, New York, N. Y., *for Columbia Broadcasting System, Inc., Amicus Curiae.*

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, New York, N. Y., *for Calvada Productions, Amicus Curiae.*

ALEXANDER & GREEN, New York, N. Y., *for Jack Chertok Television, Inc., Amicus Curiae.*

GRAUBARD & MOSKOVITZ, New York, N. Y., *for Dena Pictures, Incorporated, Amicus Curiae.*

LUMBARD, *Chief Judge*:

This interlocutory appeal under 28 U. S. C. § 1292(b) from a decision of Judge Herlands in the Southern District of New York presents the question whether the community antenna television (CATV) systems operated by defendant Fortnightly Corporation (and its predecessors) in and around the cities of Clarksburg and Fairmont, West Virginia, infringed the exclusive right of plaintiff United Artists Television, Inc. (and its predecessors) to perform

its copyrighted motion pictures in public,[1] 17 U. S. C. § 1(c), (d), by receiving and transmitting by coaxial cable to their paying subscribers the signals of television broadcasting stations in Pittsburgh, Pennsylvania, Steubenville, Ohio, and Wheeling, West Virginia, which were licensed to broadcast the motion pictures. A further issue is whether, if defendant's CATV systems did perform plaintiff's copyrighted motion pictures in public, they had a license implied in law to do so.

Pursuant to a pretrial order, these issues were separated from unrelated issues, and were tried on the assumptions that the plaintiff owned valid copyrights in the motion pictures and that defendant's CATV systems received and transmitted the signals of television stations which broadcast the motion pictures. Judge Herlands held in a thorough and considered opinion that the operation of the defendant's CATV systems constituted an unlicensed public performance which infringed plaintiff's assumed copyrights. 255 F. Supp. 177 (S. D. N. Y. 1966). We agree, and affirm Judge Herlands' decision.[2]

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[1] Although a public performance of a copyrighted motion picture which is not a photoplay protected by 17 U. S. C. § 1(d), see *Metro-Goldwyn-Mayer Distrib. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1 Cir. 1932), does not infringe the copyright unless it is for profit, 17 U. S. C. § 1(c), the issue of infringement was tried on the assumption that the signals of stations broadcasting photoplays as well as other motion pictures on which plaintiff held copyrights were received and transmitted by defendant's CATV systems, and defendant has not contended that if it publicly performed the motion pictures it did not do so for profit. Compare *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917).

[2] As Judge Herlands noted, 255 F. Supp. at 180, the facts concerning the operation of defendant's CATV systems are essentially undisputed, and the issue is whether, as a matter of law, defendant publicly performs telecast copyrighted motion pictures. Our review of Judge Herlands' conclusions is therefore not circumscribed by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-42 n. 16 (1966); *Shapiro, Bernstein & Co., Inc.* v. *H. L. Green Co., Inc.*, 316 F. 2d 304 (2 Cir. 1963).

The hilly terrain in and around Clarksburg and Fairmont makes reception by normal rooftop antennas of television programs broadcast by the Pittsburgh, Steubenville, and Wheeling stations difficult or impossible. See note 14 *infra*. Both the Clarksburg and the Fairmont CATV systems receive broadcast television signals by means of tall antennas on hilltops some two and a half and one and a half miles respectivly from the city centers, and transmit them through coaxial cables strung along utility poles and smaller "house drop" cables to television sets on subscribers' premises. The television signals of each station carried by a system are received by a separate antenna specifically designed and oriented to receive them. The signals of all the stations carried by the system are then transmitted together over its cables, without any editing or selection of programs, and the system has no way of knowing which program, if any, a subscriber has turned on. Both CATV systems carried three stations from their inception in 1953 to 1958, and five thereafter. Although there are local television broadcasting stations in Clarksburg and Weston, West Virginia, the CATV offerings attracted substantial numbers of subscribers to both systems. At the end of 1963, the Clarksburg system had 9571 subscribers and the Fairmont system 6047. The number of subscribers of each system in 1960 was over half the number of occupied housing units counted by the United States Census of Housing in the area they served.

Defendant, like its predecessors, is a private corporation operating the CATV systems for profit under municipal franchises. Each subscriber pays an initial charge, which is reduced if his premises are already connected to the CATV system, and fixed monthly charges. Additional charges are made for connecting additional sets. Different charges, sometimes individually negotiated, have at times been established for hotels, motels, and other nonresidential subscribers. Both the Clarksburg and the Fairmont systems often advertised the variety of stations and pro-

gramming they made available, at times in connection with particular programs. Both systems conducted mail ballots among their subscribers to determine which stations they preferred to receive.

A clear understanding of defendant's contention that its CATV systems do not publicly perform telecast motion pictures because the motion pictures are nowhere made visible or audible within the systems requires a brief summary of Judge Herlands' extensive and careful account of the technology of television and the operation of defendant's systems. See 255 F. Supp. at 188-97. Television broadcasting equipment first translates the sight and sound of the program being broadcast into two voltages, the video signal, which measures the intensity of light at each spot on a photosensitive screen inside the camera as it is scanned by an electron beam, and the audio signal which measures the intensity of sound. These two changing voltages are then encoded in a radio frequency carrier wave for broadcasting; the video signal is used to modify, or modulate, the amplitude, or maximum strength, of the carrier wave, and the audio signal is used to modulate the frequency of the carrier wave. The modulated carrier wave is then broadcast by an antenna as electromagnetic radiation. When this radiation strikes a home television antenna, it induces a voltage between the antenna terminals which reproduces the modulated carrier wave. The reproduced carrier wave is then conducted into the television set, and there demodulated to yield reproductions of the video and the audio signals. The video signal controls the intensity of a scanning electron beam, which reproduces on the electroluminescent interior of the television tube the image seen by the camera, and the audio signal controls the speaker of the set. Since the broadcast radiation propagates at the speed of light, the whole process of television broadcasting and reception consumes a fraction of a second.

The radiation broadcast by a television broadcasting station, when it strikes the corresponding antenna of one of defendant's CATV systems, induces in it a reproduction of the station's modulated radio frequency carrier wave just as it does in a home antenna. The CATV system's "head end equipment," housed in a small building near the antennas, then amplifies the carrier wave, converts it if it is a high-frequency, or high-band, VHF wave (channels 7 to 13) to one of the low-band VHF channels (2 to 6) in order to reduce losses in transmission through the system's coaxial cables, narrows, its frequency range, and then propogates it as electromagnetic radiation through the system's cables. The radiation, amplified by numerous trunkline and distribution amplifiers along the cables, is transmitted at nearly the speed of light to the terminals of subscribers' television sets, in most cases through matching transformers.

Before 1958 and after 1964 the function of converting high-band to low-band VHF waves at each system's "head end" was performed by equipment which heterodyned an incoming wave, that is, mixed it with a locally produced wave whose frequency was chosen so that the beat wave resulting from the mixing, whose frequency was the difference between the frequencies of the two mixed waves, possessed the desired frequency. From 1958 to 1964 the same function was performed by units which demodulated the video signal of the incoming wave and used it to remodulate a locally produced wave of the desired frequency, and which heterodyned the audio component of the incoming wave.[3] Thus broadcast television programs have never been made visible or audible within defendant's CATV

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[3] The equipment used after 1964, and that which handled the audio component of the carrier waves from 1958 to 1964, heterodyned an incoming wave twice, first to a lower frequency than that desired and thence to that desired, apparently because the wave can be more efficiently amplified at the lower frequency.

systems. Nor have the systems originated television programs. While they possessed video scanners which could transmit a still image drawn on a slide inserted in the scanner, they had no equipment capable of originating television signals representing a moving image. With such equipment at its head end, one of the defendant's systems could originate programs; but defendant's expert, A. Earl Cullum, Jr., a consulting communications engineer, testified that the added capital and operating costs of such equipment would be relatively substantial.

I.

Defendant contends that its CATV systems should not be held to have performed plaintiff's copyrighted motion pictures in public because the motion pictures were not made visible or audible within the systems, but only in the television sets owned and controlled by their subscribers. We do not think that this fact is decisive. In light of prior decisions and of the policies of the Copyright Act, the result brought about by one of defendant's CATV systems—the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers—is fairly characterized as a public performance infringing the copyrights.

No legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's.[4] We

[4] The exclusive right to perform in public, granted to holders of copyrights in dramatic compositions in 1856, 11 Stat. 138, was extended to musical compositions in 1897, 29 Stat. 481, to any "lecture, sermon, address, or similar production" by the Copyright Act of 1909, 35 Stat. 1079, and to other non-dramatic literary works in 1952. 66 Stat. 752. On none of these occasions did Congress attempt to delineate the boundaries of the right. Defendant argues that Congress has clearly evidenced an intent to limit performance to acts making a work visible or audible because all the

are furnished substantial guidance, however, by a decision of the Supreme Court finding a performance[5] on closely analogous facts, *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931). The LaSalle Hotel in Kansas City, Missouri, provided loudspeakers or headphones in each of its public and private rooms over which guests could hear the programs being received on the hotel's master radio. The hotel first contended that it did not perform the programs because a broadcast could give rise to only one performance, that by the broadcaster. Mr. Justice Brandeis, writing for the Court, stated that "no reason is suggested why there may not be more than one liability." 283 U. S. at 198. The hotel next argued that it did not perform the programs because it could not determine their content, but could

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examples of performance it has given have involved such acts. For example, the 1909 House committee report indicated that stage production of a dramatic work is a public performance, H. R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909), reprinted in Nimmer, Copyright 959, 963-64 (1964), and the 1952 amendment, at a time when the first CATV systems were already operating, see Note, Community Antenna Television: Survey of a Regulatory Problem, 52 Geo. L. J. 136, 138 (1963), limited the damages recoverable for an innocent "infringement by broadcast" of the right to perform a nondramatic literary work in public to $100. But a broadcast, and especially a rebroadcast, which seems the most likely to result in an innocent infringement, does not necessarily involve a visible or audible rendition. See note 7 *infra*. More fundamentally, the fact that Congress may have envisaged only what Judge Herlands termed the paradigm image of a public performance, an actor seen and heard by an audience assembled in his immediate presence, see 255 F. Supp. at 203, does not show that it meant to limit the concept of public performance to that paradigm when technological advances moved beyond it. See, e.g., *Jerome H. Remick & Co.* v. *American Auto. Accessories Co.*, 5 F. 2d 411 (6 Cir.), cert. denied, 269 U.S. 556 (1925).

[5] Since the copyrighted work involved in *Jewell-LaSalle* was a musical composition, the Court found a performance under 17 U. S. C. § 1(e); but there is no reason to believe that the scope of a public performance is different under 17 U. S. C. § 1(c) and (d).

only choose among the programs broadcast. The Court rejoined that "intent to infringe is not essential under the Act." *Ibid.* Finally, the hotel urged that "a radio receiving set is no more than a mechanical or electrical ear-trumpet for the better audition of a distant performance." 283 U. S. at 199 n. 7. Mr. Justice Brandeis answered:

> "The transmitted radio waves require a radio receiving set for their detection and translation into audible sound waves . . . . In addition, the ordinary receiving set, and the distributing apparatus employed by the hotel company, are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control." 283 U. S. at 200-01.

The *Jewell-LaSalle* case was followed by Judge Woolsey in *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S. D. N. Y. 1937). In the *SESAC* case, the Hotel Pennsylvania in New York City had installed loudspeakers in some 1900 guest rooms, connected to two master radios, each receiving one station, between which guests could choose by turning a knob on the loudspeaker. The hotel urged that this element of choice meant that it did not perform. Judge Woolsey held, however, that "the reception of a broadcast program by one who listens to it is not any part of the performance thereof," and concluded:

> "I find that when the owner of a hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction and transmission within its walls of a broadcast program received by it, it must be considered as giving a performance thereof within the principle laid down by the Supreme Court in the LaSalle Hotel case." 19 F. Supp. at 4-5.

This, we think, is the nub of *Jewell-LaSalle* and *SESAC:* how much did the defendant do to bring about the viewing and hearing of a copyrighted work? *Cf.* Comment, Copyrights and TV—A New Use for the Multiple Performance Theory, 18 U. Chi. L. Rev. 757, 764 (1951). Defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio programs for their guests. The expense and effort required to install, operate, and maintain the CATV systems' antennas, head end equipment, many miles of cable, and connections to subscribers' television sets clearly exceeded that involved in wiring master radio sets to loudspeakers in hotel rooms. The "piping" of radio programs was merely incidental to the hotels' business, while the only business of defendant's CATV systems is making possible the viewing of broadcast television programs. If anything were needed to demonstrate that this, and not merely delivering modulated carrier waves to the terminals of subscribers' television sets, is defendant's business, defendant's frequent advertising of the programs and stations available over its cables makes it clear. Finally, a fundamental purpose of the exclusive right of public performance is to protect copyright proprietors against dilution of the market for their works, see Nimmer, Copyright § 107.31 (1964), and a CATV system making television programs continuously available in viewers' homes seems much more likely to dispel any desire to see the same copyrighted works elsewhere than a hotel which offers the same programs to a constantly changing group of guests.

Defendant appears to concede that, under *Jewell-LaSalle* and *SESAC*, its CATV systems would perform broadcast television programs if they furnished television sets to their subscribers; but it argues that the fact that they do not is conclusive. Given the ready availability of television sets from other sources, however, defendant's decision not to provide them is wholly outweighed by the magnitude of its contribution to the viewing of broadcast television programs by its subscribers, just as *SESAC* and (by implication) *Jewell-LaSalle* held that the fact that the hotels' guests individually made the actual decisions to turn on a program and to listen to it did not negate a performance, because the hotels had done so much to provide signals which could be made audible at will.

Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constitutes a public performance. *Cf., e.g., Jerome H. Remick & Co.* v. *American Auto. Accessories Co., supra* note 4. Defendant's rejoinder is that in the case of a television broadcasting station a visible or audible rendition of a copyrighted work is given at the station's studio.[6] But as Judge Herlands

[6] Defendant reads *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943), which held that a station which rebroadcasts an unauthorized broadcast of a copyrighted work infringes the copyright, as resting upon a theory of contributory or secondary infringement. Although, as Judge Herlands noted, 255 F. Supp. at 210, the case is consistent with either theory because the original broadcaster and the rebroadcaster were apparently in privity, neither theory was explicitly adopted. Compare *Jerome H. Remick & Co.* v. *General Elec. Co.*, 16 F. 2d 829 (S. D. N. Y. 1926). And the suggestion that an unauthorized visible or audible rendition of a copyrighted work in a New York or Los Angeles studio is a *sine qua non* for infringement by rebroadcasters across the nation stretches defendant's contention to the breaking point.

found, 255 F Supp. at 190-91, no such rendition accompanies the broadcast of taped and relayed programs or, usually, of motion pictures.[7] A more fundamental defect of the rejoinder is that it disregards the policies of the Copyright Act. A television broadcast of a copyrighted work harms the copyright holder not because a handful or a roomful of persons sees the work performed at the studio,[8] but because thousands of viewers watch it in their homes. Perhaps recognizing this, defendant also contends that it is distinguishable from a broadcaster because the broadcaster is required by the Federal Communications Commission to have a studio for originating programs, generally in the principal community it serves, 47 C. F. R. § 73.613, and to retain the right to select the programs it broadcasts. See 47 C. F. R. § 73.658(e). But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. Similarly, the fact that a broadcaster chooses the programs it broadcasts, and that defendant's CATV systems did not choose those they distributed, does not mean that the latter did not render public performances.

Finally, defendant argues in its reply brief that, so far as the programs it supplies are viewed by its subscribers in their homes, any resulting performance by it is private. But it is settled that a broadcast or other transmission of

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[7] The video and audio signals for a taped program are obtained directly from the tape, and a program relayed by telephone lines or microwave transmission arrives at the broadcasting station in the form of video and audio signals. Motion pictures are usually projected inside a special closed television camera, which produces the video signal by scanning the projected image, and derives the audio signal from the sound tract.

[8] In fact, defendant apparently would not require that anyone see the visible or audible rendition at the studio, as it states that the performance in the studio is made public by broadcasting.

a work to the public or a cross-section of it results in a public performance although each individual who chooses to enjoy it does so in private. *Jerome H. Remick & Co.* v. *American Auto. Accessories Co., supra* note 4; *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), aff'd *per curiam* sub nom. *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3 Cir. 1959); *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S. D. N. Y. 1937). In any event, it seems clear to us that when one of defendant's CATV systems enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones. The contrary decision of the Exchequer Court of Canada, *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can. Exch. 382, 404-09, may have been influenced by the fact that the Canadian copyright act limited a performance to "any acoustic . . . or . . . visual representation." See [1954] Can. Exch. at 403. See also *Mellor* v. *Australian Broadcasting Comm'n*, [1940] A. C. 491, 500-01 (P. C.) (dictum).

Thus we conclude that defendant's CATV systems did more to bring about the viewing and audition of plaintiff's copyrighted motion pictures than the hotels which were held to have performed copyrighted musical compositions in *Jewell-LaSalle* and *SESAC* did to bring the music to their guests, and that the distinctions defendant advances are irrelevant to the policies of the Copyright Act. Our conclusion that defendant's CATV systems publicly performed the television programs they made available rests upon the result which they produced and which defendant clearly intended, the simultaneous viewing of the programs by its subscribers, rather than upon the technical characteristics of the systems, which both sides have urged upon

us.[9] See *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911). We therefore hold that defendant's systems publicly performed plaintiff's motion pictures.

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[9] Both parties appear to have tried the issue of infringement upon the assumption that the technological aspects of defendant's systems might prove controlling. Plaintiff contended, for example, that the demodulation and remodulation of video signals by defendant's head end equipment between 1958 and 1964 was analogous to the rebroadcasting of television signals by a translator station. Defendant rejoined that its systems performed the same function by heterodyning before 1958 and after 1964, and that because of the limited power-carrying capacity of coaxial cable the power transmitted by its head ends was far less than that emitted by a television broadcasting station.

Again, plaintiff established through defendant's expert, Mr. Cullum, that defendant's systems could not feasibly be operated without amplifiers, again because of the limited capacity of cable, and emphasized through its own expert, Lawrence H. O'Neill, Professor of Electrical Engineering at Columbia University, that a modulator or an amplifier employing a triode vacuum tube commonly uses the input current only to control the flow of a locally produced current which becomes the output, thereby suggesting that amplifying and modulating triodes "reproduce" the input in a sense relevant to copyright. Defendant brought out through Mr. Cullum that the input current is added to the output of a triode if the grid of the triode is grounded, as some of defendant's were, and that home television antennas and sets, as well as long distance telephone lines, also utilize amplifiers.

Defendant also employed technological analogies affirmatively, urging that its systems did not publicly perform telecast copyrighted motion pictures because each component had a functional analogue within a home television antenna and set. For example, defendant showed that home television sets commonly heterodyne a radio frequency carrier wave down to an intermediate frequency for more efficient amplification.

Defendant asserts that Judge Herlands rested his decision upon such technological grounds, and held either that amplification or transmission of television signals is an infringing performance, or that defendant's systems performed programs publicly because their technology resembled that of broadcasting stations. We think it clear that Judge Herlands adopted neither of these grounds, but rather concluded, as we do, that the result produced

II.

Defendant contends that even if its CATV systems publicly performed broadcast copyrighted works, they had a license implied in law to do so where the original broadcast was licensed by the copyright proprietor. The record on this appeal squarely presents the question whether such a license should be implied in law, absent any expression of the intent of the parties to the original license or in the face of an expressed intent to the contrary, because the issue of infringement was tried on the assumption that plaintiff licensed the original broadcasts of its motion pictures, and Judge Herlands found that the licenses were expressly limited to broadcasting by the licensee's transmitter, in some instances specifically excluding retransmission over CATV systems. 255 F. Supp. at 184.

Defendant's argument for a license implied in law stems from Mr. Justice Brandeis' observation in the *Jewell-LaSalle* case that the musical composition in suit was broadcast without the consent of the plaintiffs, and his suggestion that

> "if the copyrighted composition had been broadcast . . . with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare Buck v. Debaum, 40 F. (2d) 734 [(S. D. Cal. 1929)]." 283 U. S. at 199 n. 7.

It is not clear whether Mr. Justice Brandeis was suggesting a license implied in fact, based on the likely intent of the parties, or a license implied in law. The American

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by defendant's systems constitutes a public performance, and that the technical means by which the result is produced are irrelevant to this issue. Thus, for example, our decision would be unchanged if defendant's systems had made no use of amplifiers, and is unaffected by the functional analogies between their components and those of home television antennas and sets.

Society of Composers, Authors and Publishers (ASCAP), one of the plaintiffs in *Jewell-LaSalle,* has since usually included in its radio and television broadcast licenses a limitation stating that the license does not authorize "any receiver of any . . . broadcast to perform publicly or reproduce the same for profit." Brief for ASCAP as *Amicus Curiae,* pp. 4-5; Warner, Radio and Television Rights § 133a, at 355-56 n. 15 (1953). In the *SESAC* case, the only reported case in which the effect of such a limitation has been considered, Judge Woolsey expressed the opinion that the limitation was "a redundancy," adding that in any case it

> "certainly exorcises the possibility of any implied sublicense, glanced at by Mr. Justice Brandeis in a footnote to his opinion in the LaSalle Hotel case . . . ." 19 F. Supp. at 6.

Judge Woolsey clearly assumed that Mr. Justice Brandeis had meant a license implied in fact. But *Buck* v. *Debaum,* the case Mr. Justice Brandeis cited, indicates that he may have envisioned a license implied in law. The district court there held that a cafe owner who played a licensed radio broadcast to his patrons was not liable to the copyright holder. It reasoned, first, that a radio broadcast gives rise to only one performance, that at the studio—this ground was overruled by *Jewell-LaSalle*—and second, that

> "the owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition." 40 F. 2d at 736.

The district court's statement that a copyright holder could protect himself by refusing to license broadcasts strongly suggests that it believed that any attempted limitation upon a license would be invalid.

Whether Mr. Justice Brandeis meant to suggest a license implied in fact or in law, the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression. Defendant's argument for a license implied in law[10] proceeds from the principle that the primary purpose of the Copyright Act is to encourage authors and artists to release their works to the public, and that reward to the copyright holder is a secondary aim incidental to this general purpose. *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948); *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541 (2d Cir.), cert. denied, 379 U. S. 822 (1964). The secondary aim of reward to the copyright holder is satisfied, defendant contends, when the holder has been induced to license the original television broadcast, and the Copyright Act's primary policy then requires that CATV systems like defendant's be allowed to transmit the broadcast signals without further payment to the copyright holder. To buttress this contention, defendant offered to prove at trial that the royalties paid to plaintiff by the original broadcasting stations "took into account or could have taken into account the reception of the broadcasts by defendant's subscribers as well as by other members of the stations' audiences." Brief for Defendant, p. 101 n. 115; see Joint Appendix 1319a-24a. Since this offer of proof was rejected, we shall assume its accuracy, although it seems debatable, at least so far as the royalties were based upon

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[10] Defendant also argues on the same grounds that its CATV systems should not be held to perform broadcast television programs publicly; but the argument can better be considered in terms of an implied license.

revenues from local advertisers, who might well have had little or no interest in reaching Clarksburg and Fairmont viewers, see Note, CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505, 1513-14 (1966), or even from national advertisers who wished to advertise in Clarksburg and Fairmont through other stations or media.[11] See Note, CATV and Copyright Liability, 80 Harv. L. Rev. 1514, 1523-25 (1967).

Defendant relies upon holdings that a copyright proprietor may not restrict the resale of a copyrighted article after he has sold it, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 349-51 (1908), and that "when [a] patentee has sold the patented article or authorized its sale and thus granted the purchaser an 'implied license to use,' it is clear that he cannot thereafter restrict that use. . . ." *Aro Mfg. Co., Inc.* v. *Convertible Top Replacement Co., Inc.*, 377 U. S. 476, 497 (1964); see, e.g., *Adams* v. *Burke*, 17 Wall. (84 U. S.) 453 (1873). Defendant's argument from these holdings paints with too broad a brush. *Bobbs-Merrill Co.* v. *Straus* rested solely upon construction of the copyright holder's exclusive right to vend; the Court held that the first authorized sale of a copyrighted article exhausted that right, and that the purchaser might "sell it again, although he could not publish a new edition of it." 210 U. S. at 350. The rule of *Bobbs-Merrill Co.* v. *Straus* was codified in 1909, 35 Stat. 1084, as amended, 17 U. S. C. § 27, and as codified applies only when "possession" of a copyrighted article has been "lawfully obtained." See H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909), quoted in *Platt & Munk Co., Inc.* v. *Republic Graphics, Inc.*, 315 F. 2d 847, 851-52 (2 Cir. 1963). In fact, even a sale does not generally

[11] A further reason advanced by defendant for granting its CATV systems an implied-in-law license is that in some cases they are within theoretical contours of satisfactory reception defined by the Federal Communications Commission. This argument seems to us to rely essentially upon the Federal Communications Act, and we treat it in part III of this opinion.

release other exclusive rights, such as the right to copy, although this Court has held that the sales of a motion picture print conveys the right to perform it in public for profit. *Universal Film Mfg Co.* v. *Copperman,* 218 Fed. 577 (2 Cir. 1914); see *Platt & Munk Co., Inc.* v. *Republic Graphics, Inc., supra* at 851 (dictum); Nimmer, Copyright § 103.34 (1964). Thus Mr. Justice Brandeis explicitly rejected the analogy of *Bobbs-Merrill Co.* v. *Straus* in the *Jewell-LaSalle* case, stating: "It is true that control of the sale of copies is not permitted by the Act [footnote omitted], but a monopoly is expressly granted of all public performances for profit." 283 U. S. at 197. The patent holdings cited by defendant likewise apply to sales of patented articles; a patent license to manufacture, sell, or use limited, for example, to a given territory or field of use is generally upheld, so long as it does not seek to extend the patent monopoly. See, e.g., *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U. S. 175, 179-82 (1938); *Williams* v. *Hughes Tool Co.,* 186 F. 2d 278, 284 (10 Cir. 1950), cert. denied, 341 U. S. 903 (1951); Note, Patent Use Restrictions, 75 Harv. L. Rev. 602 (1962). Compare *Brulotte* v. *Thys Co.,* 379 U. S. 29 (1964).

This case presents a very different issue, the divisibility of the copyright holder's exclusive right to perform. In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences; and his right to do so has apparently never been seriously challenged.[12] See, e.g., *Goldsmith* v.

[12] This is not to say that a per se violation of the antitrust laws, such as a tying agreement, may be justified on the ground that what is tied is the right to perform copyrighted works. E.g., *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-59 (1948). But defendant has not contended that the limitations on plaintiff's licenses violate the anti-trust laws. Compare *White Motor Co.* v. *United States,* 372 U. S. 253, 261-64 (1963).

Commissioner, 143 F. 2d 466 (2 Cir.) (opinion of Chase, *J.*) (dictum), cert. denied, 323 U. S. 774 (1944); *Herwig* v. *United States,* 105 F. Supp. 384, 388 (Ct. Cl. 1952) (dictum); Milgrim, Territoriality of Copyright: An Analysis of Assignability Under the Universal Copyright Convention, 12 ASCAP Copyright Law Symposium 1, 10-13 (1963). Compare *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 227-28 (1939). Thus plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems. And aside from raising questions under the Federal Communications Act, which we examine in part III of this opinion, the fact that the original licensees broadcast furnishes no reason to deny plaintiff the right to limit its licenses to viewrs who can receive the broadcasts through normal rooftop antennas.[13] It is true that the difficulty of arranging licenses and the possibility of innocent infringement may be greater when television signals are received "off the air" and transmitted by a CATV system; but such considerations have never been held to justify an implied-in-law license.

Nor is a different result required by defendant's contention that if its CATV systems are not granted a license implied in law, its subscribers will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service. Whatever force this "double payment" contention may have, it must be made to Congress. The fact that it involves purely legislative considerations cannot be obscured by couching it in terms of the primary and secondary policies of the Copyright Act. As a matter of principle, the same problem of "double payment" seems to be presented by any periodical which derives most of its revenues from advertising, but

[13] We uphold Judge Herlands' finding that no such viewers were shown to be among defendant's subscribers. See note 14 *infra.*

also charges for copies of the periodical, and allows special rates to certain classes of readers. The resolution of such issues of publishing and broadcasting economics has not been entrusted to the courts through the Copyright Act.

III.

Defendant's third contention is that the imposition of copyright liability upon its CATV systems would clash with the underlying purpose of the Federal Communications Act "to secure the maximum benefits of radio [and television] to all the people of the United States." *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190, 217 (1943). It argues that this policy requires at least that CATV systems be free of copyright liability for transmission of a television broadcasting station's signals within the station's "Grade B contour." The Grade B contour, calculated on the basis of the height of the station's transmitting antenna and of the terrain within a two-to-ten mile radius of the antenna in accordance with tables prescribed by the Federal Communications Commission, marks the boundary along which service "acceptable to the media observer" is theoretically expected to be available 90 per cent of the time at the best 50 per cent of the locations. See 47 C. F. R. § 73.684; FCC Sixth Report and Order on Television Allocations, 1 (Part 3), 91 Pike & Fischer R. R. 601, par. 97 (1952). Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one. Judge Herlands found, however, that "no credible competent evidence was adduced" that subscribers to defendant's CATV systems could have received reasonably satisfactory pictures from the five stations in suit by using rooftop antennas.[14] 255 F. Supp. at

[14] This finding was made as to all the residents of Clarksburg and Fairmont, and is disputed by defendant. But at least as to defendant's subscribers, we do not find it clearly erroneous. Defendant's expert, Mr. Cullum, stated that he would expect some 10 to 15 per cent of the locations in and around Fairmont, and

186. Defendant also argues that since the Federal Communications Act expressly forbids rebroadcasting of broadcast signals without the broadcaster's consent, 48 Stat. 1091 (1934), 47 U. S. C. § 325(a), it implicitly excludes any other limitation upon the retransmission of broadcast signals.

Plaintiff rejoins that unrestricted distribution of television programs by CATV might well contravene the national communications policies of providing at least one broadcasting service for all and of encouraging the maximum variety of local broadcasting. The Federal Communications Commission's Second Report and Order on Community Antenna Television Systems, 2 F. C. C. 2d 725, par. 124 (1966), expresses the same apprehensions; but we need not resolve these large questions of communications policy. It is clear that, at least where defendant's subscribers could not receive the licensed broadcasters' signals satisfactorily by normal antennas, the Federal Communications Act, which lacks a comprehensive scheme of regulatory powers and private remedies, was not intended to preempt the application of the Copyright Act. *Cf.*, e.g., *United States* v. *Radio Corp. of America*, 358 U. S. 334,

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1 to 5 per cent in Clarksburg, to receive satisfactory signals from the stations in suit by rooftop antennas, and there was general, unparticularized testimony that rooftop antennas were erected and produced satisfactory pictures at a relatively small number of favored locations. But there was no testimony that any of defendant's subscribers could have done the same, and defendant has apparently never contended that they could. See Joint Appendix 1253a.

It might be urged that courts should employ the B contour as an approximate measure of the range of normal reception. But the contours are mere theoretical estimates calculated without regard to actual terrain or interference conditions and, as the record here demonstrates, "under actual conditions, the true coverage may vary greatly from these estimates." 47 C. F. R. § 683(a). Accordingly, we cannot on this record adopt the B contour as a measure of the range of reception.

348-52 (1959); *Cable Vision, Inc.* v. *KUTV, Inc.*, 211 F. Supp. 47, 56-58 (D. Idaho 1962), rev'd on other grounds, 335 F. 2d 348 (9 Cir. 1964), cert. denied, sub nom. *Klix Corp.* v. *Cable Vision, Inc.*, 379 U. S. 989 (1965). It is significant that the Federal Communications Commission has by implication expressed the same view, stating that its decisions regarding CATV are not intended to affect "copyright or other rights that broadcasters or others may have in television program material." First Report and Order on Microwave Relays, 38 F. C. C. 683, par. 159 (1965). A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas,[15] as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work.

Finally, defendant contends that it should not be subjected to copright liability because the problems raised by CATV are too multifaceted and complex for judicial resolution. We agree that it is evident that CATV raises many serious problems of public policy, which are not adequately illumined by the record before us. See generally Note, The Wire Mire: The FCC and CATV, 79 Harv L. Rev. 366 (1965). And it is clear that a court cannot undertake the fashioning of detailed, carefully graduated rules, like those contained in the Federal Communications Commission's Second Report and Order on Community Antenna Television Systems, *supra*, or in the proposed Copyright Law Revision reported by the House Committee on the Judiciary in the 89th and 90th Con-

[15] This was apparently the case in both *Jewell-LaSalle* and *Buck* v. *Debaum*.

gresses.[16] We must, however, decide the issue presented to us: whether, under the present Copyright Act, the operations of defendant's CATV systems constitute unlicensed public performances. We hold that they do, and affirm the decision below.

[16] See H. R. 2512, 90th Cong., 1st Sess. as reported, § 111; H. R. Rep. No. 83, 90th Cong., 1st Sess. 48-59 (1967); Note, CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505, 1522-25 (1966). Section 111, dealing with CATV systems, was deleted from H. R. 2512 on the floor of the House for further study by the Committees on Interstate and Foreign Commerce and on the Judiciary. See 113 Cong. Rec. H3624-28, H3643-47 (daily ed. April 6, 1967), H3857-59 (daily ed. April 11, 1967).

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*, HON. J. JOSEPH SMITH, HON. IRVING R. KAUFMAN, *Circuit Judges*.

UNITED ARTISTS ASSOCIATED, INC., *Plaintiff-Appellee*,

v.

FORTNIGHTLY CORPORATION, *Defendant-Appellant*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Questions Presented	1
Statement	3
A. [The Facts, and the Issues Before the Court Below]	3
B. [The Decision of the Court Below]	6
Summary of Argument	12
Argument	15
1. In holding that petitioner performed the copyrighted works, and performed them publicly, the Court below plowed no new fields, and decided no important question of federal law which has not been, but should be, settled by this Court. The Court below properly applied to the circumstances of the case, basic and well-settled legal principles in a way that is in complete harmony with applicable decisions of this Court	15
A. [It is well settled that the nature and novelty of the means used to perform a work are irrelevant]	15
B. [It is well settled that a public performance, and not multiple private performances, result when members of the public receive a broadcast in the privacy of their own homes]	17
C. [The decision of the Court below is in complete harmony with decisions of this Court concerning the policies and purposes of the Copyright Act. The Copyright Act is firmly rooted in the Constitution, and is no mere exception to "general policies against monopolies", and, as such, to be construed and applied most narrowly against the copyright owner]	18

Page

D. [The decision of the Court below is in complete harmony with the decision of this Court that the unlicensed retransmission to members of the public of a broadcast of a copyrighted work is an infringement] 22

E. [The decision of the Court below is not in conflict with decisions of this Court that copyright owners may not restrict the resale, by purchasers, of copyrighted books, and that patentees may not restrict the resale or use, by purchasers, of patented articles, but is in complete harmony with the decision of this Court rejecting the applicability of such decisions to the retransmission to members of the public of broadcasts of copyrighted works] 25

F. [Petitioner misplaces its reliance on a proposal to amend a pending bill and other matters wholly irrelevant to the construction and application of the Copyright Act] 27

2. Petitioner's contention that in consequence of the Copyright Act and policies thereof, and since broadcasting is defined as "radio communication intended to be received by the public", it has a license implied-in-law, is wholly without substance, and the holding of the Court below that petitioner has no such license is altogether correct 30

3. Petitioner's contention that in consequence of the Federal Communications Act, policies thereof and regulatory action thereunder of the Federal Communications Commission, it has a license implied-in-law, or is otherwise immune from copyright liability, is equally without substance, and the holding of the Court below that petitioner has no such license or immunity is altogether correct 37

4. There is no substance to petitioner's contention that "anticompetitive" considerations require

Page

that the rights of copyright owners be construed away, or be given away by constructing a license implied-in-law, to the end that CATV be immune from copyright liability. Indeed, such considerations point in the other direction 44

Conclusion 50

Appendix—Sections 1(c) and 1(d) of the Copyright Act, Tit. 17 U.S.C. §§ 1(c), 1(d) 1a

CITATIONS

CASES:

Adams v. *Burke*, 84 U.S. [17 Wall.] 453 (1873), Pet. 43 ..... 26, 27
Alfred Bell & Co. v. *Catalda Fine Arts, Inc.*, 191 F. 2d 99, 105 (2d Cir. 1951) 45
Aro Manufacturing Company v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 25, 27
Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339 (1908) ..19, 22, 26, 27, 45
Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 16, 17, 18, 21, 22, 24, 26, 27, 28, 35, 45
Columbia Broadcasting System v. *Teleprompter Corporation*, Civil Action 64-3814, U.S. District Court for the Southern District of New York ....51, fn. 19
DeForest Radio Telephone & Telegraph Co. v. *United States*, 273 U.S. 236 (1927) 27
Edison v. *Lubin*, 122 Fed. 240 (3d Cir. 1903) 16
Farmers Union v. *WDAY, INC.*, 360 U.S. 525 (1959) 43, 44
Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1937) 20
Goldsmith v. *Commissioner of Internal Revenue*, 143 F. 2d 466 (2d Cir. 1944) cert. denied, 323 U.S. 774 27
Harms, Inc. v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959) 16
Herbert v. *Shanley Company*, 242 U.S. 591 (1917) 22 fn. 6
Interstate Circuit, Inc. v. *U. S.*, 306 U.S. 208 (1939) 31, 45

Page

Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied, 269 U.S. 556 ..... 16, 17, 28
Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 16, 17
Kent v. *Dulles*, 357 U.S. 116 (1958) 30
Manners v. *Morosco*, 252 U.S. 317 (1920) 31, 32
Mazer v. *Stein*, 347 U.S. 201, 219 (1954) 20
Messager v. *British Broadcasting Company, Ltd.*, 138 L. T. 571 (C.A. 1928), [1928] 1 K. B. 660 (C.A.) Mem.; [1927] 2 K. B. 543 ..... 17, 18
Metro-Goldwyn-Mayer D. Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932) 32
Society of European Stage Authors and Composers v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) 25
Tiffany Productions v. *Dewing*, 50 F. 2d 911 (D. Md. 1931) 32
U. S. v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) .. 26, 27
U. S. v. *Loew's, Incorporated*, 371 U.S. 97 (1962) ... 45
U. S. v. *Paramount Pictures*, 334 U.S. 131 (1948) ... 20, 45
U. S. v. *Southwestern Cable Co.*, No. 363, October Term, 1967, cert. granted, October 23, 1967, 36 LW 3167 ..... 42, fn. 12
Washingtonian Pub. Co., Inc. v. *Pearson*, 306 U.S. 30 (1939) 20, 44
White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) ..... 22, fn. 6

U.S. CONSTITUTION: Art. 1, section 8, clause 8 ..... 19, 44

STATUTES:

Act of May 31, 1790, c. 15, 1 Stat. 124 19
Act of July 2, 1890, c. 647, 26 Stat. 209, the Sherman Act 19, 26
Copyright Act, Sections 1(c) and 1(d), Tit. 17 U.S.C. §§ 1(c), 1(d) ..... 1, 2, 2 fn. 1, 3, 13, 16, 18, 19, 20, 21, 24, 25, 26, 27, 30, 33, 34, 1a
Section 115(b), Tit. 17 U.S.C. § 115(b) 51
Federal Communications Act of 1934, Tit. 47 U.S.C. § 151 *et seq.* 1, 14, 30, 37
Tit. 28 U.S.C. § 1292(b) 4

Page

FEDERAL COMMUNICATIONS COMMISSION REPORTS AND ORDERS, ETC.:

*First Report and Order**, 38 FCC 683 (1965) 24, 34, 40, 42, 46, 47, 48, 49

*Second Report and Order***, 2 FCC 2d 725 (1966)..5, 21 fn. 5, 32, 41, 43, 45, 46, 47, 49

*Memorandum Opinion and Order****, 6 FCC 2d 309 (1967) 42

CONGRESSIONAL:

Bill: S. 1006, 89th Cong., 1st Sess., 1965 .....28, fn. 7

Hearings:

Copyright Law Revision—CATV, Hearings on S. 1006, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4, and 25, 1966, pp. 211-219; 230 *et seq.* .....28, fn. 8
p. 238 .....50, fn. 14

Hearings on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, Subcommittee No. 3, House Committee on the Judiciary, 89th Cong., 1st Sess., 1965, Part 1, p. 36 .....29, fn. 9
Part 2, pp. 1375-1377 .....50, fn. 14

RECORD:

Copyright Law Revision, 113 Cong. Rec. H3857, April 11, 1967, remarks of Hon. Emanuel Celler ..50, fn. 14

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* So cited herein. The lengthy title is followed by the description, "First Report and Order". It is indexed in 38 FCC as "Rules re Microwave Served CATV".

** So cited herein. The lengthy official title is followed by the description, "Second Report and Order". It is indexed in 2 FCC 2d as "CATV".

*** So cited herein. The lengthy official title is followed by the description, "Memorandum Opinion and Order". It is indexed in 6 FCC 2d as "CATV".

Page

Extension of Duration of Copyright Protection in Certain Cases, 113 Cong. Rec. S14067, October 3, 1967, remarks of Hon. John L. McClellan .....51, fn. 18

Report: H. Rep. No. 83, 90th Cong., 1st Sess., 1967, p. 49 .....50, fn. 15

MISCELLANEOUS:

Broadcasting, March 8, 1965, p. 32 .....50, fn. 17

Business Week, December 12, 1964, p. 34 .....50, fn. 17
May 1, 1965, p. 30 .....50, fn. 17

Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) Tables 9 and 10, pp. 28, 30 ..37, fn. 10; 50, fn. 16

Television Digest, July 3, 1967, p. 2 ..21, fn. 5; 50, fn. 17

Television Fact Book, 1967 Ed., No. 37, Service Volume, pp. 568a-583a .....50, fn. 14

Wall Street Journal, May 8, 1967, p. 9, col. 4 ....50, fn. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The five questions posed by petitioner, Pet. 2-4, are more properly two:

1. Whether petitioner "performs" copyrighted motion pictures "publicly" or "in public", within the meaning of §§ 1(c) and 1(d) of the Copyright Act,

when, in the operation of its CATV systems, it receives, amplifies, and otherwise processes electronically, broadcasts of television stations then broadcasting such copyrighted works under licenses granted by the copyright owner to such television stations for such broadcasts, and retransmits such broadcasts by cable to the 15,000, or so, "homes of members of the public who subscribe to the system[s]; so that the programs broadcast by the station[s] may be viewed by the subscribers on their own television sets".[1]

2. Whether, in consequence of policies of the Copyright Act, or the Federal Communications Act of 1934, as amended, policies thereof, or regulatory action thereunder of the Federal Communications Commission, when television stations broadcast copyrighted motion pictures under licenses granted by the copyright owner to such television stations for such broadcasts, petitioner, although not in fact licensed by such copyright owner for any purpose whatsoever, has a license implied-in-law, by virtue of which petitioner, in the operation of its CATV systems, does not infringe the exclusive right of the copyright owner under §§ 1(c) and 1(d) of the Copyright Act, to "perform" his copyrighted works "publicly" or "in public", by receiving, amplifying and otherwise electronically processing such broadcasts, and retransmitting them by cable, for profit, to the 15,000, or so, "homes of members of the public who subscribe to the system[s]" and pay petitioner for such service, "so that the programs

[1] Pet. 2, 4, 5, 14, 4a, 6a. All "Pet." references are to the Petition. The term "motion pictures" as used in this Brief includes "motion picture photoplays" as well as other motion pictures. See Pet. 3a, fn. 1. The provisions of §§ 1(c) and 1(d) of the Copyright Act are set out at pp. 4 and 5 of the Petition, and in the Appendix hereto, p. 1a.

broadcast by the station[s] may be viewed by the subscribers on their own television sets".[2]

The Court below answered the first question in the affirmative, and the second in the negative.

STATEMENT

A. Television broadcasting stations in Pittsburgh, Pa., Wheeling, W. Va., and Steubenville, Ohio, broadcast certain motion pictures under licenses of respondent as their copyright owner. In the operation of its CATV systems in and about Clarksburg and Fairmont, W. Va., petitioner received such broadcasts, amplified and otherwise processed them electronically, and retransmitted them by cable, for profit, without respondent's license, to the 15,000, or so, "homes of members of the public who subscribe[d] to the system[s]", and paid petitioner for such service, "so that the programs broadcast by the station[s] could be "viewed by the subscribers on their own television sets". Pet. 2, 8, 9, 12, 14, 3a, text and fn. 1, 4a, 6a. Respondent, asserting that the broadcast motion pictures were copyrighted, and that it was the owner of such copyrights, brought this action against petitioner for infringement of its exclusive right to perform them "in public", or "publicly", under §§ 1(c) and 1(d) of the Copyright Act. Pet. 4, 5, 9, 2a, 3a; JA 21-23, 130-154.[3]

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[2] Pet. 2, 5-7, 12, 14, 4a, 6a.

[3] All "JA" references are to the Joint Appendix in the Court below, copies of which have been filed herein by petitioner. All "R" references are to the original record in the Court below, which has been certified to this Court. Pet. 2, fn. 1.

Petitioner's answer raised numerous issues, and the District Court, on respondent's motion, by pre-trial order separated two of such issues for prior trial and determination. Pet. 9, 3a; JA 25, 26, 155-181, 182, 187, 188. The decision of the Court of Appeals to which this petition is addressed, affirmed, upon an interlocutory appeal under Tit. 28 U.S.C. § 1292(b), the non-final decision of the District Court, 255 F. Supp. 177; JA 19-107, in respect only of such two issues. 377 F. 2d 872; Pet. 1a. In its opinion, 377 F. 2d at 874; Pet. 2a, 3a, the Court below succinctly described the two issues before it as follows:

> This interlocutory appeal * * * presents the question whether the * * * CATV * * * systems operated by defendent [i.e., petitioner] * * * infringed the exclusive right of plaintiff [i.e., respondent] * * * to perform its copyrighted motion pictures in public * * * by receiving and transmitting by coaxial cable to their paying subscribers the signals of television broadcasting stations * * * which were licensed to broadcast the motion pictures. A further issue is whether, if defendant's CATV systems did perform plaintiff's copyrighted motion pictures in public, they had a license implied-in-law to do so.

The issues reserved by the District Court for subsequent trial and determination, *and which are yet to be tried,* have been described in general terms by petitioner, as follows, Pet. 9, fn. 4:

> Reserved under the pre-trial order for subsequent trial were affirmative defenses * * * including issues concerning the validity of the plaintiff's [i.e., the respondent's] asserted copyrights, the existence of a license implied in fact by reason of (among other things) plaintiff's course of conduct in dealing with television stations, and the issue of

> estoppel, as well as copyright misuse and antitrust defenses and the question of damages.[4]

As the Court below, and the District Court both noted, Pet. 3a, fn. 2, "the facts concerning the operation of defendant's [i.e., petitioner's] CATV systems are essentially undisputed * * *." Petitioner's radically abbreviated description of such operation, Pet. 2, is that its CATV systems operate

> by receiving through an antenna the signals of a television broadcasting station and transmitting these signals through wires to the homes of members of the public who subscribe to the system, so that the programs broadcast by the station may be viewed by the subscribers on their own television sets.

A CATV system, however, is not "simply a master TV antenna", *Second Report and Order*, 2 FCC 2d 725, 780 (1966), and the complex and sophisticated equipment and processes employed by petitioner are described in detail by the District Court, 255 F. Supp. 177, 187, 188, 190-197; JA 38-40, 44-59, and are summarized by the Court of Appeals. Pet. 6a. It suffices for present purposes to note that before retrans-

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[4] In opposing the separation for prior trial and determination of the two issues with which the decision of the Court below is alone concerned, petitioner's counsel said, R. 3846:

> * * * [Petitioner] cannot agree that * * * there are any questions in this case which are necessarily more important than any other issues. If * * * [respondent] is unable to show that it has a copyright on films on which it sues, * * * of if * * * [petitioner] is able to show that * * * [respondent] has acquiesced in its activities or is barred by estoppel or laches or has misused its copyright, then * * * [petitioner] is not liable to [respondent] * * * and that is all that is involved in this litigation.

mitting television broadcasts by cable "to the homes of members of the public who subscribe to the system", petitioner amplifies, and otherwise processes them electronically. Pet. 14, 6a.

It is clear, also, that petitioner "is a private corporation operating the CATV systems for profit" and that it charges its subscribers for its service. Pet. 4a. As the Court below noted, Pet. 3a, fn. 1, petitioner "has not contended that if it publicly performed the motion pictures it did not do so for profit".

B. In rejecting petitioner's contention, Pet. 7a; cf. Pet. 35-38, that "its CATV systems should not be held to have performed * * * [respondent's] copyrighted motion pictures in public because the motion pictures were not made visible or audible within the systems, but only in the television sets owned and controlled by their subscribers," the Court below said, Pet. 7a:

> We do not think that this fact is decisive. In light of prior decisions and of policies of the Copyright Act, the result brought about by one of defendant's CATV systems—the simultaneous viewing of * * * [respondent's] copyrighted motion pictures on the television sets of as many as several thousand of * * * [petitioner's] subscribers—is fairly characterized as a public performance infringing the copyrights.

Then, following a review of the authorities, the Court below continued, Pet. 11a, 12a:

> Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constitutes a public performance. [Citation] Defendant's [i.e., petitioner's] re-

> joinder is that in the case of a television broadcasting station a visible or audible rendition of a copyrighted work is given at the station's studio. * * * But as Judge Herlands found, 255 F. Supp. at 190-91, no such rendition accompanies the broadcast of taped and relayed programs or, usually, of motion pictures. * * * A more fundamental defect of the rejoinder is that it disregards the policies of the Copyright Act. A television broadcast of a copyrighted work harms the copyright holder not because a handful or a roomful of persons sees the work performed at the studio, * * * but because thousands of viewers watch it in their homes. Perhaps recognizing this, defendant also contends that it is distinguishable from a broadcaster because the broadcaster is required by the Federal Communications Commission to have a studio for originating programs, generally in the principal community it serves, 47 C.F.R. § 73.613, and to retain the right to select the programs it broadcasts. See 47 C.F.R. § 73.658(e). But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. Similarly, the fact that a broadcaster chooses the programs it broadcasts, and that defendant's CATV systems did not choose those they distributed, does not mean that the latter did not render public performances.

In answer to petitioner's argument, Pet. 12a; cf. Pet. 33, 34, that since the programs it supplies "are viewed by its subscribers in their homes, any resulting performance by it is private", the Court below said, Pet. 12a, 13a:

> But it is settled that a broadcast or other transmission of a work to the public or a cross-section of it results in a public performance although each individual who chooses to enjoy it does so in

> private. [Citations] In any event, it seems clear to us that when one of defendant's CATV systems enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones.

In striking down petitioner's contention, Pet. 15a; cf. Pet. 28, 29, 43-47, that "even if its CATV system publicly performed broadcast copyrighted works, they had a license implied-in-law [under the Copyright Act] to do so where the original broadcast was licensed by the copyright proprietor," the Court below said, Pet. 17a-19a:

> Defendant's [i.e., petitioner's] argument * * * proceeds from the principle that the primary purpose of the Copyright Act is to encourage authors and artists to release their works to the public and that reward to the copyright holder is a secondary aim incidental to this general purpose. [Citations] The secondary aim of reward to the copyright holder is satisfied, defendant [i.e., petitioner] contends, when the holder has been induced to license the original television broadcast, and the Copyright Act's primary policy then requires that CATV systems * * * be allowed to transmit the broadcast signals without further payment to the copyright holder. To buttress this contention, defendant offered to prove at trial that the royalties paid to plaintiff by the original broadcasting stations "took into account or could have taken into account the reception of the broadcasts by defendant's subscribers as well as by other members of the stations' audiences." * * * Since this offer of proof was rejected, we shall assume its accuracy * * *.
>
> Defendant [i.e., petitioner] relies upon holdings that a copyright proprietor may not restrict the

resale of a copyrighted article after he has sold it, *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 349-51 (1908), and that "when [a] patentee has sold the patented article or authorized its sale and thus granted the purchaser an 'implied license to use,' it is clear that he cannot restrict that use . . ." *Aro Mfg. Co., Inc.* v. *Convertible Top Replacement Co., Inc.,* 377 U.S. 476, 497 (1964); see, e.g., *Adams* v. *Burke,* 17 Wall. (84 U.S.) 453 (1873). Defendant's argument from these holdings paints with too broad a brush. *Bobbs-Merrill Co.* v. *Straus* rested solely upon construction of the copyright holder's exclusive right to vend; the Court held that the first authorized sale of a copyrighted article exhausted that right, and that the purchaser might "sell it again, although he could not publish a new edition of it." 210 U.S. at 350. * * * Mr. Justice Brandeis explicitly rejected the analogy of *Bobbs-Merrill Co.* v. *Straus* in the *Jewell-LaSalle* case, stating: "It is true that control of the sale of copies is not permitted by the Act, * * * but a monopoly is expressly granted of all public performances for profit." 283 U.S. at 197. The patent holdings * * * likewise apply to sales of patented articles; a patent license to manufacture, sell, or use limited, for example, to a given territory or field of use is generally upheld, so long as it does not seek to extend the patent monopoly.

The Court below concluded, Pet. 19a-20a:

> This case presents a very different issue, the divisibility of the copyright holder's exclusive right to perform. In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences; and his right to do so has apparently never been seriously challenged. * * * [Citations]

> Thus plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems. And * * * the fact that the original licensees broadcast furnishes no reason to deny plaintiff [i.e., respondent] the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas. * * * It is true that the difficulty of arranging licenses and the possibility of innocent infringement may be greater when television signals are received "off the air" and transmitted by a CATV system; but such considerations have never been held to justify an implied-in-law license.

With respect to the petitioner's contention, Pet. 20a; cf. Pet. 40, 41, that "if its CATV systems are not granted a license implied-in-law, its subscribers will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service," the Court below said, Pet. 20a, 21a:

> Whatever force this "double payment" contention may have, it must be made to Congress. The fact that it involves purely legislative considerations cannot be obscured by couching it in terms of the primary and secondary policies of the Copyright Act. As a matter of principle, the same problem of "double payment" seems to be presented by any periodical which derives most of its revenues from advertising, but also charges for copies of the periodical, and allows special rates to certain classes of readers. The resolution of such issues of publishing and broadcasting economics has not been entrusted to the courts through the Copyright Act.

The Court below also rejected the petitioner's contention, in effect, that its operations were covered by a

license implied-in-law, Pet. 3a, 18a, fn. 11; cf. Pet. 45-47, because "the imposition of copyright liability upon its CATV systems would clash with the underlying purpose of the Federal Communications Act 'to secure the maximum benefit of radio [and television] to all the people of the United States.'" Pet. 21a. The Court below said, Pet. 22a, 23a:

> It is clear that, at least where defendant's subscribers could not receive the licensed broadcasters' signals satisfactorily by normal antennas, the Federal Communications Act, which lacks a comprehensive scheme of regulatory powers and private remedies, was not intended to preempt the application of the Copyright Act. [Citations] It is significant that the Federal Communications Commission has by implication expressed the same view, stating that its decisions regarding CATV are not intended to affect "'copyright or other rights that broadcasters or others may have in television program material.'" First Report and Order on Microwave Relays, 38 F.C.C. 683, par. 159 (1965).

The Court below noted, Pet. 21a, that the District Court had found that

> "no credible competent evidence was adduced" that subscribers to defendant's [i.e., petitioner's] CATV systems could have received reasonably satisfactory pictures from the five [television] stations in suit by using rooftop antennas * * *

and expressly upheld "Judge Herlands' finding that no such viewers were shown to be among defendant's [i.e., petitioner's] subscribers," Pet. 20a, fn. 13, observing that petitioner "has apparently never contended that" there were. Pet. 21a, 22a, fn. 14.

SUMMARY OF ARGUMENT

1. In holding that "the technical means by which the result is produced are irrelevant", and that petitioner "performed", and "publicly" performed copyrighted motion pictures when it received and retransmitted television broadcasts of such copyrighted works to its thousands of subscribers, the Court below decided no important question of federal law which has not been, but should be, settled by this Court, but applied in the case of a new technology, basic and well-settled legal principles heretofore applied by this Court in cases of earlier new technologies. The exclusive right of a copyright owner to "perform" his copyrighted works "publicly" extends expressly to all such performances "in any manner or by any means whatsoever", no matter how new or novel, and, just as it has been held by this Court that the single rendition of a copyrighted musical selection can result, when broadcast, in more than one public performance, so, too, the single playing of a copyrighted motion picture, when broadcast, can result in more than one public performance. Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance, just as a broadcast is, and like a broadcast, it is a public performance, and not multiple private performances, although petitioner's subscribers, like the members of a broadcaster's audience, see the "show" in the privacy of their own homes. To hold otherwise would be to fail to recognize the substance and reality of the matter, no less than the object and intent of the Copyright Act. When petitioner tunes in on a broadcast for its own commercial purposes, it necessarily assumes the risk that in doing so it may infringe the performing right of another.

2. Even assuming, *arguendo,* that because broadcasting is defined as "radio communication intended to be received by the public", the public has a "right" to receive broadcasts, it does not follow that there is, in consequence, a license implied-in-law, by virtue of which petitioner may retransmit to such members of the public as are its subscribers, broadcasts of copyrighted works without authorization of the copyright owners. The exclusive right of a copyright owner under §§1(c) and 1(d) of the Copyright Act being *to perform* his works in public, not *to view* public performances of them, it is the giving of an unlicensed performance of a copyrighted work in public, not the viewing of it, which infringes the copyright owner's right. Thus, while petitioner's subscribers, and other members of the public, may, without risk of infringement, employ every available means, including petitioner's retransmission service, to make it possible for them to view broadcasts of copyrighted works, it does not follow that petitioner is free, without the license of the copyright owner, to retransmit to its subscribers, and thus publicly perform, copyrighted works being broadcast. A copyright owner's license to another to perform his copyrighted work publicly for profit, grants the licensee, and no other, the privilege of performing the work in public; and it does not "release" the work to the public-at-large, or to any segment of it; nor does it "license" the public, or any segment of it, to view such performance, as the viewing public has no need for any such license. A copyright owner licensing another to perform his copyrighted work publicly, may lawfully limit the performance licensed to be given either as to time or place, or both. The compensation paid to a copyright owner for a license to perform a copyrighted work publicly, is the measure

of the copyright owner's reward only for granting the licensee the privilege of giving the particular public performance licensed. It is not the measure of the copyright owner's reward for any other performance of his work, by the licensee, or any other, for the public generally, or for any segment of it. Petitioner's "second payment" argument is wholly without validity, for the plain reason that neither it, nor its subscribers, as such, nor as viewers of television broadcasts, make any payment referable to the copyright royalties paid by the broadcaster. Neither the Copyright Act, nor policies thereof, lend support to petitioner's contention that its public performances for profit of respondent's copyrighted works are covered by a license implied-in-law.

3. Neither the Federal Communications Act, nor any regulatory action thereunder of the Federal Communications Commission, has, or was intended to have any effect whatsoever on copyright, or on the rights of copyright owners, as the Commission has more than once emphasized. Neither the Federal Communications Act, nor policies thereof, nor any regulatory action of the Federal Communications Commission gives rise to any implication that petitioner, although not in fact licensed by respondent, is to be deemed as a matter of law to be licensed to retransmit broadcasts of respondent's copyrighted works to the homes of its thousands of subscribers. The Commission's regulatory action, on which petitioner relies, does not require petitioner to retransmit any broadcasts of copyrighted works in the absence of a license from the copyright owner, if petitioner recognizes copyright liability for its retransmissions of all broadcasts of copyrighted works.

4. There are ample remedies for violations and threatened violations of the antitrust laws, and mis-

use of copyright. Accordingly, the "possibility" that copyrights may somehow be "misused", affords no basis for depriving copyright owners of their rights as such by construing them away, or by constructing licenses implied-in-law, and giving petitioner immunity from copyright liability. Indeed, the considerations point the other way. Regulatory action of the Federal Communications Commission was found necessary to ameliorate the effects of the unfair competition which television broadcasting stations face in consequence of the refusal of CATV systems, including petitioner, to recognize copyright liability. The Federal Communications Commission found it "unfair", that, in the competition between television stations and CATV systems for audiences, the former, but not the latter, pay for their programs, that this unfair competition was inimical to the public interest, and its consequences frustrating of the purpose of the Federal Communications Act to encourage local broadcasting.

ARGUMENT

1. In holding that petitioner performed the copyrighted works, and performed them publicly, the Court below plowed no new fields, and decided no important question of federal law which has not been, but should be, settled by this Court. The Court below properly applied to the circumstances of the case, basic and well-settled legal principles in a way that is in complete harmony with applicable decisions of this Court.

A. While petitioner asserts, Pet. 21, that this is "a case of first impression on the applicability of the federal Copyright Laws to the service provided by a * * * [CATV] system", the decision below does not, as petitioner urges, Pet. 21, involve "an important question of federal law which has not been, but should be, settled by this Court". On the contrary, for while CATV is a new technological development, the Copy-

right Act itself, and the Courts in speaking to it, make unmistakably plain that a copyright owner's exclusive right "to * * * perform" his work "publicly" or "in public" under §§ 1(c) and 1(d) of the Copyright Act, and similar provisions of the Act and prior statutes, is protected against infringement "in *any* manner or by *any* method whatsoever," including the use of wholly new technologies whose advent is still in the future. See, e.g., *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556; *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129, 134 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.*, v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Edison* v. *Lubin*, 122 Fed. 240 (3d Cir. 1903). Thus, it has long been settled by this Court that "The essence of the matter * * * is not the mechanism employed, but that we see the event or story lived", *Kalem*, 222 U.S. at 61, and in *Buck*, 283 U.S. at 196-198, this Court said:

> Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed are wholly unlike any then in use, it is not denied that such broadcasting may be within the scope of the act.
>
> * * *
>
> * * * While this may not have been possible before the development of radio broadcasting, *the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured* to the composer. [Emphasis supplied.]

The holding of the Court below, Pet. 14a, 15a, fn. 9, that "the technical means by which the result is produced are irrelevant", does not involve, as petitioner claims, Pet. 43, a "novel and expansive construction" of the exclusive right of copyright owners "to perform" their copyrighted works in public. In reaching that conclusion the Court below did no more than apply in circumstances presented by a newer technology, the basic and well-settled legal principles applied by this Court in *Kalem,* on the advent of motion pictures, and in *Buck,* on that of radio.

B. Nor did the Court below depart from basic and well-settled principle in holding, Pet. 7a, 12a, 13a, that petitioner engages in "a public performance", and not, as petitioner contends, Pet. 33, 34, in "multiple private performances". This contention, once the reliance of broadcasters, has long since been discredited. In *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411, 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court said:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. *Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home.* Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. [Emphasis supplied.]

In *Messager* v. *British Broadcasting Company, Ltd.,* 138 L.T. 571, 572-3 (C.A. 1928), [1928] 1 K.B. 660

(C.A. Mem., cited by this Court in *Buck,* 283 U.S. at 197, fn. 3, Lord Justice Scrutton said:

> * * * in the Court below they [ie. the defendants] said—and I admire their courage in saying it—that though they were giving a performance to be heard by hundreds of thousands of people, it was not a public performance. As I say, I admire their courage in saying it.
>
> McCardie, J., who tried the case, found, as one would expect, that it was a public performance * * *.
>
> * * * in this Court their courage failed them, and very properly, if I may say so, they have not argued that intentionally to talk to 100,000 people is not a public performance * * *.

Mr. Justice McCardie had ruled, [1927] 2 K.B. 543, 548, 549:

> If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act.

C. The exclusive right reserved to copyright owners by §§ 1(c) and 1(d) of the Copyright Act, is to perform their works "publicly", or "in public", not to view them, and nothing in the decision below "extends", as petitioner claims, "copyright restrictions * * * to the reception and viewing of publicly broadcast television programs by members of the * * * public in their own homes on their own television sets". Pet. 21. The decision below is, rather, that in retransmitting for profit broadcasts of copyright works to its 15,000, or so, subscribers, Pet. 4a, petitioner, like the broadcaster, engages in a public performance, which, if unlicensed,

infringes the exclusive right reserved by §§ 1(c) and 1(d) of the Copyright Act to the copyright owner.

Petitioner's truncated quotation, Pet. 31, from *Bobbs-Merrill,* 210 U.S. at 346, and the phrase with which petitioner introduces it, are misleading. What this Court said was that:

> The copyright statutes ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, *nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.* [Emphasis supplied.]

This Court made no reference, nor would it, to the Copyright Act as being, Pet. 31, "a limited monopoly granted by Congress in derogation of the general policies against monopolies * * *." Article 1, section 8, clause 8, of the Constitution expressly empowers the Congress to grant "for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and there have been copyright acts on the statute books since 1790. Act of May 31, 1790, c. 15, 1 Stat. 124. The Constitution makes no reference to any so-called "general policies against monopolies," and none appeared on the statute books until a whole century later. Act of July 2, 1890, c. 647, 26 Stat. 209.

Petitioner misconceives the policy of the Copyright Act as being crudely to lure a copyright owner to "release" his work "to the public", and that once it is so released for any purpose, howsoever limited, it is, in effect, to be considered as being in the public domain free to be used, for profit, by anybody, without regard to the "harm" thereby done to the copyright owner

"by dilution of markets", or otherwise "disrupt[ing] the owner's exploitation" of the product of his creative genius. Pet. 38, 43. But while it has been said that "the primary object in conferring the monopoly" is "in the general benefits derived by the public from the labors of authors", *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932), and that the "reward" to the copyright owner is "a secondary consideration", *U. S.* v. *Paramount Pictures,* 334 U.S. 131, 158 (1948), nevertheless, as this Court made it clear in *Fox,* 286 U.S. at 130:

> Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants * * *.

Indeed, the Copyright Act is "intended * * * 'to afford greater encouragement to the production of literary works * * *' ", *Washingtonian Pub. Co., Inc.* v. *Pearson,* 306 U.S. 30, 36 (1939) and, as this Court said in *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts". Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

It is in this frame of reference that one must read §§ 1(c) and 1(d) of the Copyright Act, which grant to the copyright owner the "exclusive right" not merely to one public performance, but "expressly" to "all

public performances" of his work during the term of the copyright. *Buck*, 283 U.S. at 197. Clearly, any holding that petitioner's retransmission, for profit, to its 15,000, or so, subscribers, Pet. 4a, of a broadcast of a copyrighted work (in itself concededly a public performance) was not a public performance, would be tantamount to a holding that the copyright owner's "exclusive right" to public performances by the broadcast of his work was exhausted by one single performance. Whenever a broadcast of a copyrighted work is retransmitted by CATV into an area where local broadcasting stations have not been licensed to broadcast such work, such retransmission destroys or impairs that market for the copyrighted work, since, it is obvious, the stations serving that area will not buy and pay for, or at most will pay less for, a license to broadcast a motion picture that has already been exploited in their market. See, p. 32, *infra*.

Moreover conceivably, and, perhaps, in the not too far distant future, CATV systems may blanket the whole country and be in a position to retransmit, for profit, to their subscribers everywhere any broadcast originating anywhere.[5] Indeed, the record shows, and the District Court's undisturbed finding is that petitioner retransmits broadcasts to subscribers "beyond the radio horizon of * * * the television stations" making the broadcasts, i.e., outside the broadcasting stations' actual service areas. 255 F. Supp. at 185; JA 32. Any construction of the phrase "perform it in public in any manner or by any method whatsoever", as used in §§ 1(c) and 1(d) of the Copyright Act, as not includ-

[5] See, *Second Report and Order*, 2 FCC 2d 725, 741, 742 (1966); Roger Clipp, as quoted in "Cobb Heads NAB; Code Changes Delayed", *Television Digest*, July 3, 1967, p. 1, at p. 2.

ing petitioner's retransmission to its thousands of subscribers, of broadcasts of copyrighted works, would contravene the injunction of *Bobbs-Merrill;* 210 U.S. at 346, that copyright statutes are not to be

> * * * so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.[6]

D. The petitioner's tortured analysis, Pet. 29-37, of *Buck,* 283 U.S. 191, is a futile exercise in sophistry, for the relevant teaching of *Buck* is contained in these lines, 283 U.S. at 197, 198:

> The defendant next urges that it did not perform because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance

[6] *White-Smith Music Publishing Co.* v. *Apollo Co.,* 209 U.S. 1 (1908) on which petitioner relies, Pet. 38, fn. 36, is not to the contrary. There, in concluding that a perforated music roll for use with a playing-piano was not a "copy" of a coprighted musical composition within the meaning of the copyright statute then in effect, the Court relied largely on circumstances strongly evidencing an express intention on the part of the Congress that such rolls not be considered copies. 209 U.S. at 12-15. Since copyright is "wholly statutory", Pet. 28, any "harm" that might result to copyright owners in consequence of a construction predicated on the express intention of the Congress, would, of course, be wholly immaterial. But, where, as here, there are no extraneous aids to determining the intention of the Congress, that one of alternative constructions of the Copyright Act would whittle away rights clearly granted to copyright owners is sufficient ground for rejecting it. *Herbert* v. *Shanley Company,* 242 U.S. 591 (1917).

> for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. [Citations] No reason is suggested why there may not be more than one liability.

What this Court thus said is equally applicable here, although what petitioner has done was not possible before the development of CATV.

It is wholly immaterial, too, whether what the petitioner does is, technically speaking, "broadcasting". See Pet. 33-38. For, the fact remains that petitioner is engaged, for profit, in bringing into some 15,000 "homes of members of the public", Pet. 2, 4a, the respondent's copyrighted motion pictures, to become audible and visible on the homeowners' television sets when turned on by somebody acting independently of petitioner. This is precisely what broadcasters do, and it can make no difference under the Copyright Act whether the electronic impulses achieving this result are transmitted over the air by a broadcaster, or are transmitted by cable, as the petitioner does.

Nor is it, in this context, other than a distinction without a difference that broadcasters do the "selecting, originating, and procuring" of programs, Pet. 37, while it serves petitioner's purpose to ride the broadcasters in "piggy back" fashion, and to retransmit "to the homes of members of the public who subscribe to the system", Pet. 2, the programs which result from the broadcasters' efforts. That petitioner thus spares itself the time, effort, and expense to which broadcasters necessarily go to arrange programs attractive

to both advertisers and audience manifestly affords no basis for concluding that the petitioner need pay no heed to the exclusive rights reserved by §§ 1(c) and 1(d) of the Copyright Act to the owners of the copyrights on the motion pictures included in the programs petitioner retransmits to its subscribers. In any event, petitioner's premise is wholly untenable, for when it selects for retransmission the broadcasts of certain television stations rather than those of others, petitioner is, in a very real sense, selecting programs. The "CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) will be available on the system". *First Report and Order,* 38 FCC 683, 702 (1965). And, as this Court said in *Buck,* 283 U.S. at 198, 199, when one "tunes in on a broadcasting station, *for his own commercial purposes,* he necessarily assumes the risk that in doing so he may infringe the performing right of another." [Emphasis supplied.]

Petitioner literally grasps at a shadow and lets the substance escape when it urges, Pet. 31-38, that a broadcasting station's admitted public performance is to be found, not in the broadcast but, rather, in the "live" performance in the studio or in "the playing of a * * * motion-picture film" in the studio, when the broadcaster "substitutes" a filmed program for a "live" one. Pet. 36, 37. "The Act", petitioner notes, Pet. 37, "expressly recognizes that the playing of a * * * film * * * on which the copyrighted work is recorded constitutes a 'performance' of the work". But petitioner leans on a slim reed, if reed it be at all, when, emphasizing that it "plays" no motion picture film, Pet. 37, 38, it argues that no public performance, but only "multiple private performances" result when

it retransmits to its subscribers broadcasts of respondent's copyrighted motion pictures for viewing by them in their own homes, on their own television sets. Pet. 33, 34.

Both principle and authority require the conclusion of the Court below, Pet. 7a, 13a, that the "result brought about" and "clearly intended" by petitioner—the "simultaneous viewing" of respondent's copyrighted works "on the television sets of as many as several thousands" of its "subscribers"—is "fairly characterized as a public performance". And, the utter hollowness of petitioner's contention is laid bare by its distortion, Pet. 33, of this conclusion of the Court below, and its attempted rejoinder, Pet. 33, 34, that "it is clear that the viewing by subscribers in their homes is a private performance and is conceded to be non-infringing". For, "viewing" by petitioner's subscribers in their own homes is non-infringing, not because the CATV performances they *watch* are "private" as they clearly are not, but because the exclusive right reserved to copyright owners by §§ 1(c) and 1(d) of the Copyright Act, is "to perform" their copyrighted works in public, not "to view" such performances of them. Of course, if in ordinary circumstances, by "tuning in" on petitioner's retransmissions of television broadcasts, petitioner's subscribers may, by any stretch of the imagination, be considered as thereby "performing" the copyrighted works, *their* "performances" would be non-infringing as not being "in public". See, *Society, etc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1, 3 (S.D.N.Y. 1937), *per* Woolsey, J.

E. Petitioner is mistaken in its reliance, Pet. 41, on *Aro*, 377 U.S. 476 (1964). For, whatever may be the consequences of the *sale* of a patented *chattel*, or, of a

copyrighted *book,* for that matter, *Bobbs-Merrill,* 210 U.S. 339, this Court made it clear in *Buck,* 283 U.S. at 197, that an unlicensed retransmission to any segment of the public of a public performance by broadcast of a copyrighted work infringes the right of the copyright owner under §§ 1(c) and 1(d) of the Copyright Act. Thus, this Court said, 283 U.S. at 197:

> The argument here urged * * * is that, since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies * * * and that of giving public performances for profit * * *; and that a monopoly of the reception for commercial purposes, of this same rendition, is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339. *This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act, * * * but a monopoly is expressly granted for all public performances for profit.* [Emphasis supplied]

Neither *U. S.* v. *Arnold Schwinn & Co.,* 388 U.S. 365 (1967), nor *Adams* v. *Burke,* 84 U.S. [17 Wall.] 453 (1873), Pet. 43, supports petitioner's contention. Thus, the holding of *Schwinn* is that it is a *per se* violation of § 1 of the Sherman Act when a manufacturer and his vendees agree to restrict the territory within which, or the persons to whom, the *vendees* may resell his products. And, the holding of *Adams* is that where a patentee has assigned to another his right to manufacture, sell and use the patented article within a specified territory, the assignee cannot restrict *purchasers* of such articles from him,

to using them within the territory specified. A license to perform a copyrighted work in public involves no sale, and no physical article, patented or otherwise. Such a license conveys no interest in the copyright, and is merely a waiver by the copyright owner, to the extent it provides, of the copyright owner's exclusive right under §§ 1(c) and 1(d) of the Copyright Act to perform his work publicly. Cf. *De Forest Radio Telephone & Telegraph Co.* v. *United States,* 273 U.S. 236, 238 (1927); *Goldsmith* v. *C.I.R.,* 143 F. 2d 466, 467 (2d Cir. 1944), cert. denied 323 U.S. 774, *per* L. Hand, J. The analogies of *Aro, Schwinn* and *Adams* are no more applicable than that of *Bobbs-Merrill,* which this Court rejected in *Buck,* 283 U.S. at 197.

F. Petitioner's statistics, Pet. 23, with respect to the number of CATV systems, and the number of homes and persons served by them, are wholly irrelevant other than to demonstrate beyond peradventure of doubt, the public nature of CATV performances, and the extent to which the rights of copyright owners have been, and are being trespassed upon. That CATV systems and their subscribers have multiplied is also wholly beside the point. So, too, is the global amount of damages, Pet. 24, to which CATV systems in general might possibly, as a theoretical matter, be subject if the decision below stands. See, p. 51, *infra.* The proliferation of pirates has never been deemed an adequate reason for condoning piracy, nor has the popularity of black markets been considered any reason for sanctioning the means by which their shelves are stocked. The possible consequences of infringement, Pet. 24, could, and should have been considered by the petitioner and other CATV operators when they first embarked, and then continued on their course of

conduct after the notice implicit in the commencement of this action in June 1960. Petitioner's plaint is reminiscent of the prisoner who, when about to be sentenced for murdering his parents, sought clemency as an orphan.

Petitioner's reliance on the *ex parte* statement (Pet. 26, 27) before a Senate subcommittee of a Department of Justice officer is misplaced. Mr. Zimmerman, who normally serves as "first assistant" in the Department's Antitrust Division, was not construing the Copyright Act, but was, rather, addressing himself to a Copyright Law Revision Bill[7] which recognized CATV liability for copyright infringement, urging that the Bill be amended expressly to exempt CATV from all, or practically all, such liability.[8] Given his way, the Congress would legislate out of existence, at least so far as concerns CATV, the "monopoly * * * expressly granted of all public performances for profit". *Buck,* 283 U.S. at 197. While the considerations put forward by Mr. Zimmerman may possibly be matters to be weighed by the Congress in its deliberation of proposed legislation, they are utterly irrelevant to the construction and application of existing law. As the Court said in *Jerome H. Remick,* 5 F. 2d at 411, 412:

> Bills have been introduced in both House and Senate to permit broadcasting without infringing

[7] S. 1006, 89th Cong., 1st Sess., 1965.

[8] Mr. Zimmerman's statement appears in full in *Copyright Law Revision—CATV,* Hearings on S. 1006, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4, and 25, 1966, at pp. 211-219. Mr. Zimmerman's basic misconceptions concerning the nature of copyright, and of CATV and television operations, are succinctly pointed out in the statement of Herman Finkelstein, general counsel of the American Society of Composers, Authors and Publishers, *ibid.,* pp. 230 *et seq.*

> copyrights. The rights of composer, producer, performer, and the public under this new method of reproduction are eminently matters for considered legislation; but, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are fairly construed, applicable to the new situation.

Petitioner's reference, Pet. 22, to the statement of the Register of Copyrights before a Senate Subcommittee, is similarly irrelevant, as Mr. Kaminstein, like Mr. Zimmerman, was addressing himself to proposed legislation, and not to the Copyright Act. In this context, however, it may be observed, that when Mr. Cary, the Deputy Register of Copyrights, earlier appeared before a House Subcommittee, in Mr. Kaminstein's absence due to illness, he said:[9]

> * * * it is our view that the CATV operators are making a performance to the public of a copyright owner's work. This performance results in a profit which in all fairness the copyright owner should share. Unless he is compensated, the performance can have damaging effects upon the value of the particular copyright. For these reasons, therefore, we have not included an exemption for commercial community antenna systems in the bill.

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[9] Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Subcommittee No. 3, H. Committee on the Judiciary, 89th Cong., 1st Sess., 1965, Part 1, p. 36.

2. Petitioner's contention that in consequence of the Copyright Act and policies thereof, and since broadcasting is defined as "radio communication intended to be received by the public," it has a license implied-in-law, is wholly without substance, and the holding of the Court below that petitioner has no such license is altogether correct.

Petitioner in effect argues, Pet. 6, 45, 46, that since "broadcasting" is defined in the Federal Communications Act as "radio communication intended to be received by the public", its subscribers, as members of the public, have a right to receive broadcasts, which carries with it a license implied-in-law under the Copyright Act, by virtue of which petitioner may retransmit to its subscribers broadcasts of copyrighted works without authority from the copyright owners for such retransmissions. But, even assuming, *arguendo,* that the public has such a "right," which at best must be dubious, to state the proposition is to refute it. Certainly, no one would suggest that the right to travel abroad, which this Court recognized in *Kent* v. *Dulles,* 357 U.S. 116 (1958), carries with it a license implied-in-law permitting those engaged in supplying the land, sea and air transportation essential to the exercise of such right, freely to use the patents they need in order to render such service.

Contrary to petitioner's claim, Pet. 46, no member of the public viewing an unlicensed performance of a copyrighted work thereby runs any "risk of infringement" under the decision of the Court below. The exclusive right secured to copyright owners by §§ 1(c) and 1(d) of the Copyright Act is *to perform* their works in public, not *to view* them, and accordingly the risk of infringment is not run by viewers of an unlicensed public performance, but by those who perform it. While the public is, accordingly, free, without risk

of infringment, to utilize the retransmission service of "entrepreneurs" like petitioner, Pet. 46, it does not follow, necessarily or otherwise, that such "entrepreneurs" are by that token authorized without license-in-fact, publicly to perform copyrighted works by retransmitting broadcasts of such works for profit to members of the public who are their subscribers.

Thus, it is not an "anomaly", as petitioner claims, Pet. 44, that under the decision of the Court below while "the individual homeowner could take such steps as he wishes to install an adequate antenna of his own without infringement, an entrepreneur may not supply an antenna service to a number of homeowners so that they may watch the performance in their homes". Once again, the distinction is, of course, between *watching* a performance and *giving* one.

Nor has it ever heretofore been suggested that by licensing a public performance of a copyrighted work in one place, e.g., Pittsburgh, the copyright owner loses his exclusive right to other public performances of the work in the same place, or in other places, e.g., Clarksburg, W. Va., Los Angeles, or New York. Indeed, in *Manners* v. *Morosco,* 252 U.S. 317, 325 (1920) this Court recognized that a license to perform a copyrighted work publicly "within * * * territorial limits", reserves to the copyright owner his exclusive right to perform it publicly elsewhere. See also, *Interstate Circuit, Inc.* v. *U. S.,* 306 U.S. 208, 227, 228 (1939).

The horror petitioner expresses, Pet. 41, 42, at the thought that the Court below should "explicitly" sanction "territorial zones by copyright licenses", and that the respondent "has attempted to draw such lines in its licenses," must be feigned. Licenses publicly to

perform copyrighted works have historically and traditionally been limited "territorially" to a particular theater, or group of theaters, or to a particular community or region, and such licenses have, of course, been judicially enforced. See, e.g., *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); *Tiffany Productions* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931). Clearly, in licensing public performances of a copyright work, it is the copyright owner's right to specify that the performances licensed may be given only "within the territorial limits stated" in the license. *Manners* v. *Morosco*, 252 U.S. at 325. Cf. *Second Report and Order*, 2 FCC 2d 725, 778 (1966), where the Federal Communications Commission said:

> A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process * * *.

Petitioner argues that it is free without license to retransmit "to the homes of members of the public" who are its subscribers, Pet. 2, licensed broadcasts of respondent's copyrighted motion pictures because

"The copyright owner has received his reward for the release to the public which the station * * * intends to serve when it makes its broadcast". Pet. 39.

But, petitioner misconceives the scope of the terms "publicly" and "in public" in the context of §§ 1(c) and 1(d) of the Copyright Act. To license another to perform a copyrighted work "publicly", or "in public", is not, as petitioner seems to think, Pet. 39, to "release" it "to the public" which the licensee "intends to serve". It is rather, but a license authorizing the *licensee,* but no other, to perform the work "in public", at the time and place, and in the manner specified in the license.

In licensing a broadcasting station, the copyright owner licenses the broadcasting station publicly to perform the copyrighted work, and that, and nothing else, is what the copyright owner is paid for. It is wholly immaterial that the measure of the fee charged may have been the estimated size of the broadcasting station's audience, Pet. 40, even assuming *arguendo,* although the Court below considered it "debatable", Pet. 17a, that it may have been over-estimated because in certain areas theoretically "served" by the broadcasting station, its broadcasts cannot be received, or received satisfactorily. It has never heretofore been as much as suggested that when a copyright owner licenses the public performance of a copyrighted work in a particular theater on a given night, with royalties based on the theater's capacity, and the theater is only half filled, a stranger to the license (or, indeed, to any license, for that matter) is free, without license, publicly to perform the work that same night, in a second theater, to an audience no greater than half the first

theater's capacity. That, however, is precisely the measure of petitioner's claim.

Petitioner's "second payment" argument, Pet. 38-43, is a witch's brew of bad law and singularly doubtful economics. It comes, moreover, with ill grace from one who "without paying anyone", *First Report and Order*, 38 FCC 683, 704 (1965), engages, for profit, in the business of retransmitting "to the homes of members of the public" who pay for its service, Pet. 2, the valuable work-product of others, i.e., television programs, which, in turn, incorporate the valuable copyrighted works of still another, i.e., respondent's motion pictures.

Petitioner argues that the decision of the Court below "authorizes the extraction of a second payment—a second royalty for the same broadcast", because "the copyright owner has received his payment—his reward" from the broadcaster. Pet. 38-40. But petitioner itself asserts, Pet. 39, it "is not a broadcaster," and, in any event, it is clear, petitioner is in no case the broadcaster who has paid a license fee to the copyright owner for the privilege, personal to the broadcaster, of publicly performing the copyrighted work by broadcasting it. However, when the licensed broadcaster exercises the privilege granted to him by the copyright owner, petitioner receives the broadcast and retransmits it by cable, for profit, "to the homes of members of the public who subscribe to the system" and pay petitioner for its service. Pet. 2, 12, 14, 6a. Broadly speaking, what the Court below held was that the copyright owner was entitled to payment from the petitioner for the petitioner's use, in the manner described, of the copyrighted work. More technically put, the Court below held that what petitioner did constituted a second public performance of the copyrighted

work, distinct from that of the broadcaster, and that being unlicensed, the petitioner was liable as an infringer. As this Court said in *Buck,* 283 U.S. at 198:

> * * * nothing in the Act * * * prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit.

Since §§ 1(c) and 1(d) of the Copyright Act reserve to the copyright owner the "exclusive right" to all public performances, it is the copyright owner's clear right to be compensated for each public performance of his work. "No reason is suggested why there may not be more than one liability". *Buck,* 283 U.S. at 198.

Petitioner argues, Pet. 40, that "[a]lthough the copyright owner had already been compensated by the broadcaster for the reception of the broadcast", as the result of the decision of the Court below, "he can now impose an additional charge on those in the station's service area who choose to subscribe to the reception service provided by a CATV". The argument proceeds from a false premise to an insupportable conclusion.

The copyright owner is not compensated by the broadcasting station for "the reception of the broadcast" by anybody, but is, rather, compensated by the broadcasting station for the privilege, personal to it, of publicly performing the copyrighted work by broadcasting it. Unlike petitioner, neither the copyright owner nor the broadcasting station "imposes", or otherwise makes any charge for the reception of the broadcast. Neither do those who utilize the broadcasting station's facilities to advertise their wares. They hope, of course, that such advertising will increase their sales,

but viewers of television broadcasts are free to purchase, or not, the advertised products, wholly as they see fit.

While it may be assumed that in charging advertisers, a broadcasting station takes into account, among other things, its program costs, including copyright royalties, and that the expense of advertising a product, like other costs of sales, is reflected in its price, petitioner's claim, Pet. 40, that copyright royalties paid by broadcasting stations are for this reason a "charge" on viewers, as such, is wholly without foundation. For, excepting only the charges which petitioner and other CATV operators make of their subscribers, viewers of television programs are charged nothing, and pay nothing for viewing them. Of course, they, as well as non-viewers who purchase a product which is advertised in any manner, pay a price for it that includes a factor for the cost of advertising it through all media used —newspapers, radio, periodicals, billboards, direct-mail campaigns, etc., as well as television; and the segments of the public reached by the different advertising media are not, of course, mutually exclusive. Thus, while advertising costs are in their totality "borne by the public who patronize the advertiser", Pet. 40, there is no basis whatsoever for concluding that the cost, or any element making up the cost of advertising the product in any one of the media used, is borne by purchasers from among the segment of the public reached by such medium. Accordingly, to say with particularity, as the petitioner does, Pet. 40, that copyright royalties paid by a broadcasting station are "a charge on those in the station's service area", i.e., are paid for by viewers of its broadcasts, is to indulge in pure conjecture.

Petitioner's "second payment" argument is wholly without validity, for the plain reason that neither it, nor its subscribers, as such, nor as viewers of television broadcasts, now make any payment referable to the copyright royalties paid by the broadcaster. The decision of the Court below is, in effect, that the copyright owners are entitled to compensation *from petitioner* for *its* retransmissions to its subscribers, for profit, of broadcasts of their copyrighted works. The payment of such compensation is an ordinary business expense and petitioner will, of course, have the option of either passing it on to its subscribers by increasing the fees it charges them, or of absorbing it, by reducing its shareholder's profits.[10]

3. Petitioner's contention that in consequence of the Federal Communications Act, policies thereof and regulatory action thereunder of the Federal Communications Commission, it has a license implied-in-law, or is otherwise immune from copyright liability, is equally without substance, and the holding of the Court below that petitioner has no such license or immunity is altogether correct.

Petitioner indulges in a confusion of identities, and distorts the decision of the Court below, when it says, Pet. 47-53, that under it the public is denied "the right to receive authorized broadcasts within the service area of the broadcasting stations as measured under F.C.C. regulations". Pet. 47. Clearly, the decision of the Court below does nothing of the kind. The holding below is that the *petitioner* infringes copyrights

[10] See Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965), esp. Table 9 at p. 28, and Table 10 at p. 30, indicating the profit ratios of CATV systems, by size, in terms of numbers of subscribers, as ranging up to 72 percent of revenues and 59 percent of capital.

when, without licenses from the copyright owners, *it* receives and retransmits broadcasts of the copyrighted works, for profit, to its 15,000, or so, subscribers. Nor is "the public * * * restricted in any way" by the decision of the Court below, "in the antenna it could erect or use for reception". Pet. 48. The restriction is wholly on petitioner, not to receive and retransmit to its subscribers, for profit and without license, broadcasts of copyrighted works, on pain of being held an infringer.

The emptiness of petitioner's position is demonstrated by the avidity with which it seizes upon, and argues from what may be an infelicitously phrased dictum of the Court below, Pet. 48-53, 23a, to the effect that *if* petitioner's subscribers were able satisfactorily to receive by ordinary means the broadcasts petitioner retransmits to them ("no such viewers were shown to be among [petitioner's] * * * subscriber's", Pet. 20a, fn. 13) *then,* "it might * * * be contended that a copyright holder licensing a broadcast * * * *must be held to have licensed* their viewing of the work". [Emphasis supplied] The Court below was fully aware that it is the performing of a copyrighted work in public, not the viewing of it by the public, that requires the copyright owner's license. What the Court below is to be taken as suggesting is that *if* the circumstances posited were the fact, it *might* be contended that *to that extent* petitioner's operations were sanctioned by licenses *implied-in-fact.* As already noted, however, the issue as to whether there were licenses implied-in-fact was reserved by the District Court for later trial and decision, which still lie in the future, and no such question was before the Court below upon the interlocutory appeal taken to it. Pet. 2a, 3a, 9, fn. 4. In-

deed, in suggesting the point, the Court below expressly stated, Pet. 23a, that it did "not decide" it.

Petitioner confuses, Pet. 49, the dictum of the Court below on the point which it thus left expressly undecided, Pet. 23a, with its holding, Pet. 22a, that "the Federal Communications Act * * * was not intended to preempt the application of the Copyright Act", certainly, "at least", where petitioner's "subscribers could not receive the licensed broadcaster's signals satisfactorily by normal antennas". In concluding that no license *implied-in-law* could be constructed on the Federal Communications Act, the Court below thus properly directed its holding to the facts before it, for as it noted, Pet. 20a, text and fn. 13, none of petitioner's subscribers "were shown" to be able to "receive the broadcasts through normal rooftop antennas", and, as the Court below added, petitioner "has apparently never contended that they could". Pet. 21a, 22a, fn. 14.

Petitioner, Pet. 48, however, erroneously takes the holding of the Court below to be that it has a license implied-in-law to retransmit broadcasts of copyrighted works to such of its subscribers as can receive "the licensed broadcaster's signals satisfactorily by normal antennas". Pet. 23a. Petitioner's argument, Pet. 47-53, both proceeds from, and is addressed to this completely mistaken reading of the decision of the Court below, and is, accordingly, wholly irrelevant. It is, moreover, entirely devoid of substance. For, even assuming *arguendo* that, as petitioner mistakenly claims, Pet. 48, the Court below "erected a negative test", such "test" is not, as petitioner claims, at odds with the "B contour" concept to which the Federal Communications Commission's "carriage require-

ment", Pet. 47, 48, is geared.[11] For, the "B contour" concept in not sacrosanct. Thus, in promulgating its "carriage requirement", the Commission said, *First Report and Order,* 38 FCC 683, 718 (1965):

> Moreover, we note another qualification. We have used the concepts of principal community, grade A, and grade B contours, already embodied in our rules * * * . Once again, we stress that we are using signal contours as useful rules of thumb.

The Commission then made it clear that the "contour" concept would not apply when it did not reflect the fact, saying, 38 FCC at 730, 731:

> In dealing with * * * the carriage * * * requirements, we have made liberal use of the * * * contour concepts * * *. * * * these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction * * * are based on * * * assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a prima facie presumption as to the location of signal contours. * * * however, any party, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere.

Thus, as the Court below noted, the Federal Communications Commission itself has recognized that "under actual conditions, the true coverage may vary greatly

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[11] "* * * the requirement in the Commission's CATV rules that a CATV system carry upon request the signal of any station 'within whose Grade B contour the system is located.'" Pet. 47, 48.

from" the "B contour" rule of thumb. Pet. 21a, 22a, fn. 14. The Commission's ultimate test, like the "test" attributed to the Court by petitioner, is actual, reasonably satisfactory reception. Pet. 21a. Neither the policy of the Communications Act nor the Commission's regulatory action thereunder, requires that petitioner have a license implied-in-law to receive and retransmit a television station's broadcasts of copyrighted works to subscribers who, while within the station's "B contour", are not actually so located as to be able to receive "service acceptable to the media observer", Pet. 21a, without the aid of a retransmission service such as petitioner's. While such viewers may hypothetically be within the station's "service area", they are not so in fact.

Petitioner's reliance, Pet. 47, on the Commission's "carriage requirement" as a basis for a license implied-in-law, suffers from another fatal infirmity. The Commission has made it unmistakably plain that its "carriage requirement" is to be taken as being completely subordinate to, and not one whit in derogation of copyright. Thus, in reaffirming, and extending the applicability of its "carriage requirement" the Commission said, *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966):

> * * * our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. * * * the fact that we have given the local station the right to have its signal carried over the CATV system * * * affords no defense to that system in a copyright suit. The

> station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). * * * In short, if the copyright suits are decided adversely to the CATV industry, we may * * * have to revise our rules.

As the Court below noted, Pet. 23a, the Commission said earlier that it was "unnecessary" for it to incorporate in its rules "an express declaration that nothing in them is intended to affect, in any way, the copyright or other rights that broadcasters or others may have in television program material". *First Report and Order,* 38 FCC 683, 740 (1965).

And when CATV systems argued the converse to the Commission, i.e., that its "carriage requirement" should be rescinded[12] because of the decision of the District Court in this very case, the Commission made it plain that upon application, it would waive the carriage requirement for CATV systems which complied with such decision, and followed a policy of securing "copyright clearance". Thus, in its *Memorandum Opinion and Order*, 6 FCC 2d 309, 314 (1967) the Commission said:

> Finally, * * * we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case * * * systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated * * * our rules are based on the present situation in which the CATV system

[12] In *U.S.* v. *Southwestern Cable Co.,* No. 363, October Term, 1967, cert. granted, October 23, 1967, 36 LW 3167, one issue is the validity of the Commission's CATV regulatory rules, as applied to non-microwave CATV systems like those of the petitioner here. Pet. 52.

> operates without regard to copyright clearance. * * * As to the above argument, the short answer is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. * * *

The Commission has gone so far to leave no room for doubt that its "carriage requirement" is subordinate to copyright as to caution television stations "to take into account the effect of any copyright decision in making requests for carriage under the present rules". *Second Report and Order,* 2 FCC 2d 725, 769, fn. 51a. See fn. 11, *supra,* p. 40.

Accordingly, it is *not* true to say, as petitioner does, Pet. 55, that "What the F.C.C. requires CATV systems to do * * * would, under the decision below, make the system liable for copyright infringement", and that "Since the systems are required to carry the local station's signal—compulsory carriage in the 'B' contour—the CATV is caught between requirement of the law and the copyright proprietor's demands". Petitioner would convert the "carriage requirement" which the Commission expressly subordinated to obligations under copyright law, into any instrument for evading them.

Farmers Union, 360 U.S. 525 (1959) on which petitioner relies, Pet. 55, does not support its position. There it was held that a broadcasting station permitting

a political candidate to broadcast over its facilities in accordance with the provisions of § 315 of the Federal Communications Act, which expressly denies stations the right to censor such broadcasts, was not subject to an action for libel on account of what the candidate said. In reaching that conclusion this Court noted that while the Congress had failed to pass legislation granting stations immunity in this situation, 360 U.S. at 533,

> * * * the Federal Communications Commission * * * has long interpreted § 315 as granting stations an immunity. * * * Not only has this interpretation been adhered to despite many subsequent legislative proposals to modify § 315, but with full knowledge of the Commission's interpretation Congress has since made significant additions to that section without amending it to depart from the Commission's view.

The circumstances here could hardly be more different.

4. There is no substance to petitioner's contention that "anticompetitive" considerations require that the rights of copyright owners be construed away, or be given away by constructing a license implied-in-law, to the end that CATV be immune from copyright liability. Indeed, such considerations point in the other direction.

Copyright is a limited monopoly expressly sanctioned by the Constitution, Article I, section 8, clause 8, and granted by the Congress in order "'to afford greater encouragement to the production of literary works * * *'". *Washingtonian Pub. Co., Inc* v. *Pearson,* 306 U.S. at 36. That, like all other rights, copyright may be subject to abuse, is no ground for construing the Copyright Act "so narrowly * * * as to deprive

those entitled to their benefit of the rights Congress intended to grant." *Bobbs-Merrill,* 210 U.S. at 346. Petitioner points to "possibilities of harmful competitive consequences", Pet. 26-28, and to the enhancement of the "economic power to control television" that might result, Pet. 42, if petitioner, and others engaged in the business or retransmitting television broadcasts to their subscribers for profit, should be required to give recognition to the "monopoly * * * expressly granted [to copyright owners] of all public performances [of their works] for profit". *Buck,* 283 U.S. at 197. But there are ready means of dealing with such abuses when, and if, they arise, and the possibility that an innocent right may be abused is no ground for its curtailment or destruction, by construing it away, or otherwise. Petitioner's argument suggests that the right of private ownership of dwelling houses should be abolished or curtailed, because such right "raises possibilities" of their being used as instrumentalities for illegal purposes. It has, however, never been thought necessary to go that far.

The Congress has endowed the antitrust laws with a variety of sanctions, and a whole arsenal of means of enforcement, fully adequate to prevent violations when they are threatened, and to redress them, and punish violators, when they occur. The antitrust laws are sufficiently versatile to deal adequately with violations threatened or effected through the instrumentality of copyright. See e.g., *U.S.* v. *Loew's, Incorporated,* 371 U.S. 97 (1962); *U.S.* v. *Paramount Pictures* 334 U.S. 131 (1948); *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 105 (2d Cir. 1951); *Second Report and Order,* 2 FCC 2d at 778. There is no need, nor

would it be appropriate to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade.

Petitioner's argument in this regard would appear to be wholly captious, for the shoe is very much on the other foot. The Federal Communications Commission has made it clarion clear that it found it necessary in the public interest to adopt its "carriage requirement"—the very rule on which petitioner would rely for immunity from copyright—and its related "non-duplication" and "distant signal " rules, "to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential". *Second Report and Order,* 2 FCC 2d 725, 736 (1966). That risk the Commisison found in the unfair competition between CATV and broadcasting, in that broadcasters pay for their programs, while "CATV carries them without paying anyone * * * " for them. *First Report and Order,* 38 FCC 683, 703-706 (1965); *Second Report and Order,* 2 FCC 2d at 778-781. Underlying this anomaly, and "central" to the Commission's "evaluation of the nature and effects of competition between CATV and television broadcasting" is " the present inability of program suppliers to control the availability of their programs via CATV", due to the refusal of CATV to recognize copyright. *First Report and Order,* 38 FCC at 740; fn. 32 at 704; See also, *Second Report and Order,* 2 FCC 2d at 768. The Commission observed, 38 FCC at 702 that:

> When a cable [i.e., CATV] system brings to a [broadcasting] station's market additional signals which would not be readily available in the system's absence, it introduces competition for audi-

> ence attention—and audience attention is the basic commodity that a station sells to advertisers.[13]

Furthermore, the Commission observed, 38 FCC at 702, 703, the "competition between CATV systems and [broadcasting] stations is marked" by a feature "not present in the ordinary competition between broadcasting stations":

> * * * the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air reception and cable reception. * * * A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station.

In short, the Commission found, 38 FCC at 704, 705, and reaffirmed in *Second Report and Order,* 2 FCC 2d at 778-781, that:

> The * * * situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations—duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those

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[13] Two local television stations serve Clarksburg and Fairmont, W. Va., where petitioner's CATV systems operate. The Court below noted that in 1960, the "number of subscribers of each system was over half the number of occupied housing units * * * in the area they served". Pet. 4a. The figures more closely approximated 72% and 73%, respectively, according to the District Court. 255 F. Supp. at 187; JA 36, 37.

programs without effectively outbidding the local station in the program market. * * * CATV, however, carries them without paying anyone or engaging in any bidding process. From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity, as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.

* * *

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition.

This "competition", the Commission noted, 38 FCC at 700, 701

* * * is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.

* * * In dealing with competition between broadcasters * * * "* * * The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." * * * But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service".

The Commission took note of the case here at bar, 38 FCC at 704, fn. 32, and said:

> We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

The Commission struck at the very root of the matter when it said, 38 FCC at 706:

> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.

In sum, it is clear that the root of the evil that threatened the public interest objective of the Federal Communications Act to encourage "a multiplicity of local station outlets", *First Report and Order,* 38 FCC at 700, and to frustrate its achievement sufficiently to impel the Federal Communications Commission to adopt its "carriage requirement" and its related "nonduplication" and "distant signal" rules, was the adamant refusal, which still persists, of CATV operators, including petitioner, to recognize copyright. See, *passim First Report and Order,* 38 FCC 683-746 (1965). *Second Report and Order,* 2 FCC 2d, 725-808 (1966). In these circumstances, it is strange audacity for petitioner to put forward its empty claims that "anti-

competitive consequences", Pet. 42, or, for that matter, "communications" considerations require that it be given immunity from copyright.

IN CONCLUSION

Finally, it must be noted that petitioner's doleful prediction of the dire consequences which will befall the CATV industry if the decision below stands, Pet. 24, 25, is unabashed *fulmen brutum*. Petitioner is well aware that the number of "subscribers" to "the average CATV system", Pet. 25, is no measure of the financial stature of those who operate CATV systems. Indeed, as petitioner must also be well aware, the roster of corporations owning and operating CATV systems, directly or indirectly, is star-studded with financial giants.[14] The CATV industry is reliably reported to have "annual revenue of over $150 million"[15] and profit ratios ranging up to 72 per cent of revenues and 59 per cent of capital.[16] A leader of the CATV industry confidently predicts annual revenues for the industry in the near future of 2.3 billion dollars.[17]

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[14] See, *Copyright Law Revision*, Hearings on S. 1006, fn. 8 p. 28, *supra*, p. 238; *Hearings on H.R. 4347*, etc., fn. 9, p. 29, *supra*, Part 2, pp. 1375-1377; Copyright Law Revision, 113 Cong. Rec. H3857, at H3880, H3881, April 11, 1967, remarks of Hon. Emanuel Celler; Television Fact Book, 1967 Ed., No. 37, Service Volume, pp. 568a-583a. The Wall Street Journal, May 8, 1967, p. 9, col. 4, reported the sale to one purchaser of about 4% of the stock of a leading CATV operator, having a market value in the neighborhood of $5,250,000.

[15] H. Rep. No. 83, 90th Cong. 1st Sess., 1967, p. 49.

[16] Seiden, *loc. cit. supra*, fn. 10, p. 37.

[17] *Television Digest*, July 3, 1967, p. 2. Indeed, CATV systems have been described as "money machines". *Broadcasting*, March 8, 1965, p. 32; cf. *Business Week*, Dec. 12, 1964, p. 34; *id.* May 1, 1965. p. 30.

Suppliers of copyrighted filmed television programs, like respondent, quite naturally look upon the CATV industry as, potentially, a very substantial customer for their products, and they are fully aware that it would hardly be in their interest to endanger this source of business, whatever their rights, *strictissimi juris,* may be. This is evidenced, if by nothing else, by their voluntary agreement, now in effect, not to sue CATV systems for infringement so long as current mutual efforts to reach "contractual arrangements" and to resolve differences over proposed amendments to the Copyright Law Revision Bill, continue.[18]

In any event, in view of the three-year statute of limitations on actions for copyright infringement, Copyright Act, § 115(b), the CATV industry's potential liability for its intransigence is substantially less than it would have been, had copyright owners not been more disposed to arriving at "contractual arrangements" than to litigate. For, in addition to this action, so far as respondent has been able to ascertain, only one action has been commenced against a CATV system for copyright infringement.[19] Petitioner's fears for the CATV industry if the decision below stands, are groundless.

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[18] See, Extension of Duration of Copyright Protection in Certain Cases, 113 Cong. Rec. S14067, October 3, 1967, remarks of Hon. John L. McClellan.

[19] *Columbia Broadcasting System* v. *Teleprompter Corporation,* Civil Action No. 64-3814, U.S. District Court for the Southern District of New York. This action is still pending.

For all of the reasons hereinabove set forth, the petition should be denied.

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APPENDIX

Sections 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d)) provide as follows:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever * * *

SUPREME COURT, U. S.

NOV 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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CITATIONS

Page

CASES:

Aro Manufacturing Company v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 4

Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (1925) 5

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 5

Messager v. *British Broadcasting Co.*, [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 660, *aff'd*, [1929] A.C. 151 5

United States v. *Southwestern Cable Co., cert. granted*, 36 U.S.L.W. 3171 (U.S. Oct. 23, 1967) (No. 363) 10

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 5, 6

STATUTES AND RULES:

Communications Act of 1934:

47 U.S.C. 153(o) 7
47 U.S.C. 303(h) 8

28 U.S.C. § 1292(b) 2

Conn. Gen. Stat. Rev. §§ 16-1, 16-330, 16-331 6

FEDERAL COMMUNICATIONS COMMISSION REPORTS AND ORDERS:

Second Report and Order, Community Antenna Television Systems, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966) 8, 9, 10

Memorandum Opinion and Order, 6 F.C.C. 2d 309 (1967) 8

TEXTS:

Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514 (1967) 4, 7

B. Kaplan, *An Unhurried View of Copyright*, (1967) .. 7

Page

LEGISLATIVE MATERIALS:

Hearings pursuant to S. Res. 201 on S. 1006 before Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966) 3

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PETITIONER'S REPLY BRIEF

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1. As the district court noted, this case raises "novel questions" (JA 19) as to the application of the copyright statute to the operation of community antenna television systems (CATV). These questions, which the district court called the "basic issue of copyright infringement" (JA 25) were separated under Federal Rule 42 from the other issues in the pleadings on Respondent's motion. R. 3853-3923. In support of its motion, Respondent urged that the separate determination of the "vital" Copyright and Communications Act question was urgent since if this "decisive" issue of "important national interest" was not separated and determined, Respondent and other copyright owners

"will be forced to bring a multiplicity of law suits throughout the United States." R. 3888, 3891, 4158, 4166, 4169.

Without denying the importance of the case, Respondent (Respondent's Brief in Opposition, pp. 4-5, hereinafter cited "Res. Br.") now implies that the decision on the basic copyright-communications law issue is somehow not ripe for determination by this Court and should await a trial on the other separated issues.[1] This implication flies in the face of Respondent's statement, consenting to Petitioner's appeal under § 1292(b), that "The reason for Plaintiff's desire to facilitate an appellate review of the issues decided by the District Court herein is the vital importance of the basic copyright issue in this case to the motion picture, television and CATV industries."

Unless reviewed by this Court, the decision below on the basic Copyright and Communications Act questions will constitute for practical purposes the controlling resolution of the issue. Certainly, it will establish the rule governing the suits to be filed in the Second Circuit. Also, Respondent has sent briefs to municipalities throughout the country advising that they are liable as contributory infringers if they franchise CATV systems in their municipalities. R. 5268 et seq. A decision by this Court will remove doubts as to municipalities' actions on CATV franchises.

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[1] Respondent quotes (Res. Br. 5, n. 4) out of context from Petitioner's opposition to the motion for separation of the issues as implying that the decision below is not final as to the "basic copyright issue". Petitioner opposed the motion to separate primarily on the ground that it was premature: Petitioner's discovery had only started, while Respondent's discovery was complete. R. 4186 et seq.

The Register of Copyrights, in testimony on the general copyright bill, recognized both the importance and novelty of the issue presented to the Court in this case.[2] In this testimony, the Register stated that the issue presented represents a major issue on which the present law is unsettled. He termed the question one of "national importance" that is "inextricably bound up with policy questions in the communications field."[3]

2. In ruling on the "basic copyright issue", the court below proclaimed a new doctrine of contributory infringement. A CATV system was held to have publicly performed because of the "magnitude of its *contribution* to the viewing of broadcast television programs by its subscribers". Pet. 11a. (Emphasis supplied.) Respondent concedes that the *viewing* by the subscribers does not constitute infringement. Res. Br. 25. If "the result brought about by one of defendant's CATV systems" (Pet 7a) is concededly non-infringing, it is impossible to see how Petitioner can be liable because it "contributed" to bring about that result.

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[2] Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., at 10 (1966).

[3] *Id.*, at 10. Respondent quotes (Res. Br. 29) from earlier testimony of the Register of Copyrights who originally favored a "similar conclusion" (JA 106) to that of the court below: that CATV systems should be considered performers. Subsequently, in his testimony on general copyright revision before the Senate Copyright Subcommittee, he said that in his earlier testimony quoted by Respondent, he was "*not expressing any opinion as to what the present law on the subject is*, and that the problems facing CATV operators in obtaining clearances are real ones that cannot be brushed aside". *Id.*, at 6. (Emphasis supplied.) In his Senate testimony, he favored a bill which would provide non-liability for CATV reception within the normal service area of the stations whose signals are received. *Id.*, at 6-9.

Respondent abandons the contributory concept of performance announced by the court below. Respondent distinguishes between *viewing* by a subscriber, which it concedes is non-infringing, and its theory of *performance* by a community antenna system, which is independent of the "viewing". Res. Br. 25.[4] Respondent's theory is that the community antenna systems are liable for infringement, not because they contribute to the "viewing" by subscribers as the court below held, but because the systems receive and "transmit" or "retransmit" the broadcast signals.[5] Respondent argues as though "transmit" and "perform" were synonymous and as though "transmit" appeared in the statute. Transmission is the process of transferring an electrical signal from one location to another and has no necessary relevance to performance.[6] Transmission may have copyright significance if the person transmitting, for example, a broadcaster, has first made a

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[4] Thus, a homeowner is not restricted in any way in the antenna he wants to erect for reception, and his reception and viewing of the programs would not infringe (Res. Br. 38). In Respondent's view, however, the homeowner is compelled to "do it yourself" and is not free to enlist the services of persons in the position of Petitioner to assist them. Compare *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 495, 498-500 (1964); see Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1529 (1967).

[5] "Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance . . . ." (Res. Br. 12) See also, e.g., Res. Br. 12, 13, 18, 21, 22, 23, 25.

[6] In the district court, the Respondent conceded that "No contention has been made that plaintiff, or for that matter anyone else, owns a copyright in the electromagnetic waves broadcast by the television stations and retransmitted by defendant's CATV systems." Supplemental Memorandum on Copyright Law (R. 5457 et seq., at 5459).

performance which by transmission he makes public. The performance is separate from the transmission.

The cases relied upon by Respondent provide no support for the transmission theory. Res. Br. 17-25. In the *Remick* case[7] and the *Messager* case[8] the performance was not in the "transmission" but was live in the studio. The critical question was whether the live performance in the studio had been made "public" by being broadcast.[9]

Respondent's theory of "performance" based merely on the fact of "transmission" of electromagnetic energy would encompass common apartment house master antenna systems, communications common carriers and indeed every television and radio set. Respondent's expert made it clear that transmission is involved every time a wire or cable is utilized to transfer electromag-

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[7] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (1925).

[8] *Messager* v. *British Broadcasting Co.* [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151.

[9] Respondent mistakenly relies (Res. Br. 16) on *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911) in support of a theory that the Copyright Act will always cover new technological developments. *Kalem* focused on the meaning of the statutory words and held that a motion picture based on a book infringed the right "to dramatize" the work, since drama can be achieved by action as well as word. The rule on "after developed" methods was stated in the *Remick* case, *supra*, where the court said (p. 411):

> "In other words, the statute may be applied to new situations not anticipated by Congress, *if, fairly construed, such situations come within its intent and meaning.*" (Emphasis supplied.)

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908), in construing the word "copy", shows that the proper principle of statutory construction is to determine the "ordinary sense" or "common understanding" of the word, at 16, 17.

netic energy from one location to another. JA 554. Thus, an apartment house master antenna and even a home antenna receive and transmit the signal from the antenna to the set, just as a CATV does. JA 641-643.

If the mere act of "transmission" constitutes the performance, then every apartment master antenna system is engaged in a public performance although the program is unseen and unheard and, as in the case of Petitioner's CATV system, incapable of being seen or heard within the system. Communications common carriers provide inter-city and intra-city television transmission service to television networks and stations. It is inconceivable that the "ordinary sense" or "common understanding" [10] of "performance" in the Copyright Act encompass a sweeping doctrine under which communications common carriers perform a copyrighted work because they provide transmission service and, therefore, the copyright owner can collect an additional royalty from them.[11]

The error in Respondent's position lies in Respondent's confusion of "performance" with "transmission" and its distortion of the meaning of "performance"

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[10] *White-Smith, supra,* n.9 at 16, 17.

[11] The public utility statutes of Connecticut classify CATV systems as public service companies subject to the jurisdiction of the Public Utilities Commission in the same manner as telephone companies. Conn. Gen. Stat. Rev. §§ 16-1, 16-330, 16-331. If telephone utilities (communications common carriers) providing television transmission service for broadcast stations are not making a performance, then CATV systems in Connecticut are likewise not performing. In fact, of course, CATV in states other than Connecticut is engaged in private carriage of signals for subscribers who pay the fee and is no more a performer, because of "transmission", than a telephone company.

beyond the "ordinary" and "common sense" meaning of the word as contemplated by the Copyright Act.

As was recently stated by Professor Benjamin Kaplan:

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications . . . . Instead of conjuring with 'transmission', we have to consider whether clamping down copyright controls would have any hurtful anticompetitive effects, or would be consistent with the declared purposes of the Federal Communications Act, or would serve as a desirable means of correcting the hardships which CATV systems may visit on TV stations in the same localities." B. Kaplan, *An Unhurried View of Copyright,* 105-06 (1967) (printed earlier in 66 Colum. L. Rev. 831, 844 (1966)).

3. Respondent would write the Communications Act off the books so far as the right of the public to receive licensed broadcasts is concerned, and would turn the public's access to broadcasts solely on copyright law. Res. Br. 34-39. Respondent would collect one royalty from the broadcasting station, and another from the public for its use of a CATV system (or an apartment house master antenna because of transmission) to receive a broadcast. Respondent's argument runs roughshod over the Act's definition of broadcasting as "the dissemination of radio communications intended to be received by the public . . . ." 47 U.S.C. 153(o) (1964). This provision, as has been recently noted, "means that the homeowner has the right to receive any material which is broadcast over the public airways." Note, *CATV and Copyright Liability,* 80 Harv. L. Rev. 1514, 1520 (1967).

In furtherance of its authority to establish "areas or zones" to be served by television stations (47 U.S.C. 303(h) (1964)), the Commission adopted the CATV rules set out in the *Second Report and Order*.[12] In a subsequent general reconsideration of those rules, the Commission described the rules as requiring a CATV system to "carry the signal of a station which puts a Grade B or better contour over any part of the community" subject to priorities in the regulations.[13] Explaining that the regulations on carriage further its "responsibility to prescribe the areas to be served by television broadcast stations (Section 303(h))," [14] the Commission went on to say (id., para. 32):[15]

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[12] *Second Report and Order, Community Antenna Television Systems*, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966).

[13] *Memorandum Opinion and Order*, 6 F.C.C. 2d 309, para. 11 (1967).

[14] *Id.*, para. 12.

[15] The criticism of the B contour carriage rule, which Respondent repeats, that reception under actual conditions may vary from the "B" contour rule of thumb (Res. Br. 40-41) was rejected by the Commission (*id.*, para. 12 n.6):

> "However, examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time. Moreover, where a community comes within the predicted Grade B contour of a station, the station's signal is normally readily available for reception by the sophisticated CATV equipment, utilizing as they do choice receiving sites."

The "radio horizon" referred to by Respondent (Res. Br. 21) is no measure of a station's service area. Because broadcast television signals follow the contour of the earth by a process known as "bending", reception beyond the radio horizon is normal; the B Contour of a television station is beyond the radio horizon. (JA 1162-1164, 1170, 1177-1178)

> "We regard this [B] contour as generally delineating the area within which service from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the Grade B contour in order that the station may have access to all persons within this general service area."

The Commission undertook in its regulations "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States." [16] There is no justification for fashioning under the copyright law a limitation on the public's right of access to broadcasts in a station's service area as designated by the Commission.

At the very least, the court below offended the policies of the Copyright Act and the Communications Act when it imposed infringement liability on Petitioner with respect to one-half the situations in which Petitioner's CATV systems are located within the B Contour of the stations. Pet. 15-16. Since CATV operation within the B Contour of the station is common, involving millions of viewers, this aspect of the decision alone is, Petitioners submits, sufficient reason for granting the writ.

4. The Federal Communications Commission has moved to deal with any danger to the public interest and to copyright owners by reason of CATV existence and activity. Its rules were designed to deal with the competitive impact of CATV systems on broadcasting stations, and the other problems referred to by Respondent (Res. Br. 46-49). The Commission concluded that "they represent a fair balancing of the competing

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[16] *Second Report and Order*, para. 47.

interests, and properly accommodate both industries and thus, the public interest . . . ." [17]

The validity of the Commission's regulation of CATV is now before the Court. *United States* v. *Southwestern Cable Co., cert. granted,* 36 U.S.L.W. 3171 (U.S. Oct. 23, 1967) (No. 363). Determination of the *Southwestern* case will not dispose of the issues presented here as to the application of copyright to the operations of a community antenna system. The *Southwestern* case and the present case are complementary and together present the major public issues relating to CATV. Review of this case with the *Southwestern* case will enable the Court to consider what Professor Benjamin Kaplan called "the problem of the place of CATV systems in national communications" by dealing simultaneously with the interrelated policies of the Communications Act and the Copyright Act.

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[17] *Id.*, para. 109.

CONCLUSION

The petition should be granted.

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Dated: November 9, 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*

MOTION AND BRIEF FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
MOTION	1
BRIEF	4
A. PRELIMINARY STATEMENT	4
B. INTEREST OF AMICUS CURIAE	4
C. ARGUMENT	5
I. The History and Posture of the Case	5
II. The Expansion of the Copyright Monopoly	6
D. CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

United States v. *Loew's, Inc.*, 371 U.S. 38 (1962) 10
Midwest Video Corp. et al. v. *U.S. et al.*, (8 Cir., Case Nos. 18052 and 18348 pending) 10
United States v. *Paramount Pictures, Inc. et al.*, 344 U.S. 131 (1948) 9
Southwestern Cable Co. v. *U.S. et al.*, 378 F. 2d 118 (9 Cir., 1967) *pet. for cert. filed* (Nos. 363 and 428), 36 U.S.L.W. 3045 (U.S. July 13, 1967) and 36 U.S.L.W. 3061 (U.S. July 27, 1967) 10

STATUTES:

17 U.S.C. § 1 *et seq.* 5

ADMINISTRATIVE RULES AND REGULATIONS:

47 C.F.R. § 73.636 10
47 C.F.R. § 74.1101 *et seq.* 8
47 C.F.R. § 74.1103 10

OTHER AUTHORITIES:

Hearings pursuant to S. Res. 201 on S. 1006 10
Television Digest's CATV & Station Coverage Atlas, 1967-68 Ed., p. 4a 7

UNITED STATES SUPREME COURT RULES:

Rule 35 1
Rule 42 4
Rule 42(3) 1

IN THE

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OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42(3) of the Rules of this Court, National Community Television Association, Inc., (NCTA) respectfully moves the Court to grant NCTA permission to file a Brief *Amicus Curiae* herein on the following grounds:

1. NCTA has requested permission of both parties herein to file a Brief *Amicus Curiae*. On October

4, 1967, Respondent United Artists Television, Inc., refused such permission.

2. NCTA is the national organization of the community antenna television industry, which industry will be directly affected by the outcome of this matter, and therefore NCTA is a vitally interested applicant.

3. The questions presented indicate conflicts of national policies affecting the entire CATV industry, the informational perspective to which lies peculiarly within the observation of an organization representing a substantial part of that industry.

4. The questions presented indicating a conflict of national policies are:

   A. Whether the imposition of copyright infringement liability on CATV systems announces a rule contrary to the policies of the Copyright Act and the Communications Act; and,

   B. Whether the extension of the statutory copyright monopoly to CATV systems announces a rule contrary to the policies of the national anti-trust laws.

5. NCTA believes that the parties, not representing the broad industry view, will present arguments more narrowly aimed at the effects of the ruling on the parties herein, and that, because the result will affect an entire industry, NCTA wishes to inform the Court of the CATV industry's viewpoint and of the severe impact of the decision on that industry.

6. The policies contained in the Copyright Act, the Communications Act, and the anti-trust statutes have a direct bearing on the extension of copyright monopolies, and may be dispositive of the case.

RESPECTFULLY SUBMITTED this 16th day of October, 1967.

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BRIEF

PRELIMINARY STATEMENT

Pursuant to Rule 42 of the rules of this Court, National Community Television Association, Inc., (NCTA) files this brief in support of its Motion for Permission to File Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF AMICUS CURIAE

National Community Television Association, Inc., (NCTA), incorporated in 1952, is the national trade organization of the community antenna television (CATV) industry, representing 881 CATV systems having 1,354,447 subscriber-homes or an average of 3,369,675 television viewers. NCTA reflects a source of information about the CATV industry which consists of about 1800 operating systems, 1153 enfranchised but not yet operating systems, and 1672 applicants for franchises. The opinions of the lower courts have a direct impact on NCTA, its members, as well as the public, both present and potential subscribers, the operating and potential CATV industry as a whole, and the more than ninety associate members of NCTA which supply the industry with goods and services. NCTA is vitally concerned with this impact, not only on its existence but that of the industry as a developing communications technology which has existed for almost twenty years.

ARGUMENT

I. The History and Posture of the Case

The opinion of the United States District Court for the Southern District of New York, dated May 23, 1966, reported at 255 F. Supp. 177, and the opinion of the United States Court of Appeals for the Second Circuit, dated May 22, 1967, reported at 377 F. 2d, treat a question of judicial first impression. The judgment sought to be reviewed was dated and entered on May 22, 1967, and Fortnightly Corporation invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). By order of this Court entered on July 21, 1967, the time for filing a Petition for Writ of Certiorari was extended until September 15, 1967, on which date Fortnightly Corporation filed its Petition for a Writ of Certiorari.

The Fortnightly Corporation's Petition presents questions of federal law which have not been but should be settled by this Court. These questions reveal judicial extension of the Copyright Act[1] by interpretation. The application of copyright sanctions will drastically modify and possibly threaten even the existence of the CATV industry. The entire CATV industry is filled with anxiety concerning its status with respect to, as used in the Copyright Act, a "performance", a performance "in public", a performance authorized by a license implied in law, double payment to the copyright owner sanctioned by the lower courts' decisions for a single broadcast performance, and all of the ramifications of copyright monopoly as it might be applied to CATV.

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[1] 17 U.S.C. § 1 *et seq.*

The statutory language and statement of the case have been fully set forth in Fortnightly Corporation's Petition, and the basis for federal jurisdiction in the court of first instance is contained in 28 U.S.C. § 1338.

II. The Expansion of the Copyright Monopoly

The decisions of the courts below impose copyright infringement liability on a television reception device for the first time, affecting the viability of about 1800 existing CATV systems and the television reception of almost ten million persons. If not reversed or modified, it extends the statutory copyright monoply of hundreds, perhaps thousands of copyright holders to a position of control over the reception of television. This control will allow copyright proprietors to follow their *rights* into the homes of television viewers by imposing a further charge on home television reception or by utilizing the right to black out signals which are otherwise receivable.

The expansion of the statutory monopoly creates an atmosphere in which copyright holders can initiate litigation which has the capacity to bankrupt CATV systems or result in their acquisition to satisfy the potentially huge amount of accrued damages. To see how this could be accomplished, one needs only to examine the structure of today's CATV industry.

The CATV industry is predominantly oriented toward small systems in smaller sized communities:

Size of City	Number of Systems in Cities of This Size Category	Number of U. S. Cities in Size Category
1,000,000 or more	1	5
500,000-1,000,000	5	16
250,000-500,000	1	30
100,000-250,000	15	79
50,000-100,000	66	180
25,000-50,000	131	366
10,000-25,000	314	978
5,000-10,000	327	1,282
2,500-5,000	324	1,763
1,000-2,500	320	3,515
Under 1,000	283	9,874
TOTAL	1,787	18,088

Total Population in Communities with Operating Systems	27,511,611
Total Population in Communities without Operating Systems	151,711,564
Total U. S. Population (1960 Census)	179,323,175

Source: *Television Digest's CATV & Station Coverage Atlas,* 1967-68 Ed., p. 4a

The average system has 1350 subscribers. The typical CATV systems arose in smaller communities to provide better reception and diversity of television signals, and in the larger cities to eliminate interference caused by terrain and large buildings. The average system employs about three persons in addition to the system owner. The average system simply distributes television signals received off-the-air to its subscribers. Audience rating services, such as American Research Bureau, include CATV subscribers in the average net weekly circulation of television stations, upon which

figures television advertising rates are computed. CATV systems, until distribution of the signals received, do not know the nature or content of the signals and cannot know whether the programming broadcast by the stations received contains copyrighted material. Because the system operator does not know in advance of the distribution of signals whether they will contain copyrighted works, as a practical matter, he is unable to negotiate for a license with the copyright holder. The small system operator's problems are compounded when, for instance, a television network program contains a copyrighted work and the system operator may not even know where to find the copyright owner. In the normal course of his business, the small system operator simply has no one with whom to negotiate a copyright license to distribute signals. Since he does not originate the programs, he cannot negotiate with program suppliers in a situation in which competition between program suppliers will keep the price of licenses within reach. He is limited to what the television stations are originating and must distribute their signals.[2]

To the average CATV system operator, the situation in which he finds himself is extremely alarming. To him the only question is the public's right to receive that which is broadcast into the ether. He cannot reconcile the fact that when he increases the ability of viewers to receive a television signal thereby increasing the advertising rates of the station and consequently the amount paid to the copyright owner, the decisions of the lower courts also require him to pay

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[2] The Federal Communications Commission has promulgated rules governing the operation of CATV systems. 47 C.F.R. § 74.1101 *et seq.*

additional amounts to the copyright holder even though the same signal may be available to his subscribers if they chose not to subscribe to his CATV service. To him this is purely and simply discrimination against his subscribers, as well as against a business enterprise which he has operated for many years. To him such a result is legally authorized double payment for one performance, and he desperately fears the consequences.

The average CATV system operator recognizes that due to the limitations of broadcast technology there is not as much service as there ought to be. The effect of the lower courts' decisions is to freeze that technology to a vague and indefinite standard of "normal" roof top antenna reception, enabling a copyright owner to carve out and control markets which were never contemplated in the Copyright or Communications Acts.

The potential damages which could be incurred under the decisions of the lower courts would not vary with the size of the system, the number of subscribers, or the system operator's ability to pay. Should damages be severely computed, the filing of a number of law suits could result in accrued damages which could exceed the monetary value of the CATV industry. Such a construction of the Copyright Act could foster the concentration of control over production, distribution, and exhibition of copyrighted product in the CATV industry which was struck down in the motion picture industry in *United States* v. *Paramount Pictures, Inc., et al.*[3] This control, if used in conjunction with broadcasters of television programming, through

[3] 344 U.S. 131 (1948).

the use of clearances or exclusive licenses, could create an atmosphere conducive to restraint of trade having more impact than was involved in *United States* v. *Loew's, Inc.*[4]. The United States Department of Justice has warned of the probability of that atmosphere.[5]

The real prospect of control of the CATV industry by copyright owners may present other conflicts with the national communications policy as enunciated in the rules and regulations promulgated by the Federal Communications Commission which restrict concentration of control of competitive communications media.[6] The Federal Communications Commission's rules compelling carriage of certain television broadcast stations' signals on CATV systems[7] is a policy which also apparently conflicts with the decisions of the lower courts in the instant case.

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[4] 371 U.S. 38 (1962).

[5] *See,* Statement of Edwin M. Zimmerman, Acting Assistant Attorney General, Department of Justice, *Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U. S. Senate, 89th Congress, 2nd Session, pursuant to S. Res. 201 on S. 1006, August 2, 3, 4, and 25, 1966* (hereinafter *Hearings pursuant to S. Res. 201 on S. 1006*), p. 211 *et seq.*

[6] See generally, 47 C.F.R. § 73.636. It should be noted that television broadcast networks own about 20% of all network programming. See *Hearings pursuant to S. Res. 201 on S. 1006,* at 212, n. 2.

[7] 47 C.F.R. § 74.1103. The entire regulatory scheme is being examined in cases pending in the United States Court of Appeals for the Eighth Circuit, *Midwest Video Corp. et al.* v. *U. S. et al.,* Case Nos. 18052 and 18348. *See also, Southwestern Cable Co.* v. *U. S. et al.,* 378 F. 2d 118 (9 Cir., 1967) *pet. for cert. filed,* 36 U.S.L.W. 3045 (U.S. July 13, 1967) (No. 363) and 36 U.S.L.W. 3061 (U.S. July 27, 1967) (No. 428).

CONCLUSION

The confrontation involves much more than the infringement of the copyright of one plaintiff by a CATV system defendant. The social, economic, and policy reverberations will sound throughout the nation now and for many years to come, affecting not only copyrights but the structure of an entire industry and the communications service to the public which that industry provides. NCTA believes that the novel questions presented are worthy of consideration by this Court.

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October 16, 1967.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S OBJECTION TO THE MOTION OF NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

For the following reasons, respondent withholds its consent and objects to the motion of National Community Television Association (hereinafter, NCTA) for leave to file a brief *amicus curiae* in support of the petition herein for a writ of certiorari:

1. The 56-page petition herein for a writ of certiorari was duly filed September 15, 1967.[1] Accordingly, it

[1] Respondent's time to file its brief in opposition to the petition has been extended to November 3, 1967, by the Clerk, on consent.

was fully available to NCTA for a month before this motion was filed on October 16, 1967, and NCTA knows, or should know exactly what arguments petitioner has made. Moreover, E. Stratford Smith, Esq., one of petitioner's attorneys in both Courts below, and one of its attorneys on the petition herein for a writ of certiorari, was introduced on August 2, 1966, at a hearing on a copyright revision bill, to the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee by NCTA's president as "the special counsel to the National Community Television Association". *Hearings on S. 1006,* August 2, 3, 4, and 25, 1966, 89th Cong. 2d Sess., at page 84. In these circumstances, NCTA's "belief", Par. 5, p. 2, that "the parties", presumably, petitioner, "not representing the broad industry view, *will* present arguments more narrowly aimed at the effects of the ruling on the parties herein * * * " is curiously and unconvincingly prospective. An examination of the petition will confirm that NCTA's "special counsel", doubling as an attorney for petitioner, did not overlook the "broad industry" viewpoint, as NCTA would suggest.[2] Moreover, NCTA does not specify in what respects, if any, petitioner's arguments are "narrowly aimed", and, indeed, it could not. The petitioner has made vivid the view, which NCTA proposes to present, Par. 5, p. 2, that this case "will affect an entire industry", with emphasis *in extenso* on "the severe

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[2] It may be noted, also, that a "Legal Memorandum of the NCTA in Rebuttal to the Statement of Louis Nizer Before Subcommittee No. 3 of the House Judiciary Committee" is signed "E. Stratford Smith, Special Counsel to the National Community Television Association". *Hearings on H.R. 4347, etc., Bills for the General Revision of the Copyright Law,* Subcommittee No. 3, H.R. Judiciary Committee, 89th Cong., 1st Sess., 1965, Part 2, pp. 1307-1312.

impact of the decision on that industry". While its assertion is that it "wishes to inform the Court of the CATV industry's viewpoint", Par. 5, p. 2, NCTA nowhere discloses in what respects, if any, the "CATV industry's viewpoint" differs from that already expressed by the petitioner.

2. The "informational perspective" which NCTA claims as "peculiarly" its, Par. 3, p. 2, and that it possibly "reflects", as it says it does, "a source of information", p. 4, are wholly irrelevant to the role it seeks to play in this proceeding unless, upon the consideration of the petition herein for a writ of certiorari, this Court is to receive *ex parte* evidence. In any event, NCTA does not point to what, if any, relevant facts or "information", not already presented by petitioner, or not included in the gargantuan record in this case, it would supply. The record, to the extent included in the Joint Appendix in the Court below, which has been filed with this Court, comprises 1,342 printed pages, and 435 printed pages of exhibits. The trial took 19 days. Certainly, in any event, it would not be too much to assume that whatever information is available to NCTA was equally available to E. Stratford Smith, Esq., its "special counsel", who has been one of petitioner's attorneys throughout the litigation, and appears as one of its attorneys on the petition herein.

3. It is not clear whether the considerations put forward by NCTA in its "Argument" in support of this motion, pp. 5-11, are the considerations it would urge if this motion were granted. However, if they are, NCTA's participation as *amicus curiae* would demonstrably add nothing, for each and every of the considerations it advances has been fully dealt with,

at length, in the petition,[3] except, perhaps, NCTA's "information" concerning the "typical" or "average" CATV system and its operator, pp. 7-9, which is patently irrelevant. For, whether the "typical" or "average" CATV system is located in a small town or a large one, whether it employs three people or 30, or whether its "subscribers" number 1,350 or 13,500, or any similar "information" has, and can have no bearing whatsoever on whether the Court below "has decided an important question of federal law which has not been, but should be settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court", which are, essentially, the criteria governing the disposition of the petition by this Court. Rule 19, Par. 1(b).

Substantively, too, such "information" is wholly irrelevant. For, it sheds no light on the scope and extent of the "exclusive right" of a copyright owner to "perform" his copyrighted works "publicly" or "in public", within the meaning of sections 1(c) and 1(d) of the Copyright Act, nor does it help to determine whether "in simply distributing television signals received off-the-air to its subscribers",[4] p. 7, a CATV system "performs" copyrighted works being transmitted by such signals, "publicly" or "in public", within the meaning of sections 1(c) and 1(d) of the

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[3] See, e.g., pp. 6 and 9 of the brief in support of the motion, which parallel p. 24 of the petition; pp. 7 and 8, which echo p. 25 of the petition; and p. 10, which simply summarizes the arguments at pp. 26-28, 38, 42 and 53-56 of the petition.

[4] A CATV system, however, is by no means "simply a master TV antenna". *Second Report and Order*, 2 FCC 2d 725, 780 (1966). The complex and sophisticated equipment and processes employed by petitioner are described in detail by the District Court, 255 F. Supp. 177, 187, 188, 190-197; and are summarized by the Court of Appeals, Petition, App., p. 6, 377 F.2d 872, 875, 876.

Copyright Act. NCTA's "information" concerning the "typical" or "average" CATV system clearly has no relevancy to whether there are "policies" of the Copyright Act, or antitrust considerations, or "policies" of, or regulatory action under the Federal Communications Act, which support petitioner's broad contention that it has no copyright liability either because it does not "perform" broadcast copyrighted works, or perform them "publicly" or "in public", when it retransmits them, or because it has a license implied-in-law to do so.

The substantive points made by NCTA in support of its motion are the same as those urged by petitioner. Accordingly, respondent reserves its answers thereto for its brief in opposition to the petition.

For all of the reasons hereinabove set forth, and because NCTA has not set forth any "facts or questions of law that have not been presented" by the petitioner, except "facts" that are manifestly irrelevant, the motion, which is "not favored," should be denied. Rule 42, Pars. 1, 3.

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No. 618

In the Supreme Court of the United States

OCTOBER TERM, 1967

FORTNIGHTLY CORPORATION, PETITIONER

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, PETITIONER

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari was granted in this case on December 4, 1967, and the Court invited the Solicitor General to file a brief expressing the views of the United States. Before responding on the merits, however, we deem it appropriate to bring to the Court's attention circumstances which may argue against present review of the difficult issues involved.

Unquestionably, the case presents an important question under the copyright laws which has great practical significance for the CATV industry, the broadcasters and the copyright owners. Its resolution, moreover, directly concerns several government agencies, the Copyright Office, the Antitrust Division of the Department of Justice, and the Federal Com-

284-820—67

munications Commission. Fully tried on an ample record and carefully reviewed on appeal, the case accordingly seems ripe for adjudication in this Court. Yet, we suggest that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution.

In our view, it is most unlikely that judicial proceedings under present law can achieve a workable and permanent solution to the overall problem of copyright liability for CATV operations that is consistent with the public interest. One evident difficulty is that courts are not wholly free to weigh and accommodate conflicting policy considerations; bound to apply existing law, they cannot make adjustments with the same freedom as the legislative branch. Yet all the governmental agencies with responsibilities in the area—whatever their different points of view—are agreed that a simple "yes" or "no" answer to the legal question presented here would not satisfactorily resolve the underlying problems as a matter of policy. Indeed, holding CATV systems liable for all copyright infringements might have a substantial adverse effect on the viability and continued growth of CATV as a valuable adjunct of live broadcasting. And, on the other hand, holding CATV systems immune from copyright liability in all cases probably would provide CATV with an unfair advantage over certain competitors (such as new UHF stations) and might unduly deter the creative incentive which copyright protection is designed to foster.

To be sure, there may be less radical alternatives open to the courts in this matter. But, judicial limitations foreclose at least some of the options available to the legislative branch. And, of course, the nature of the judicial process, requiring the adjudication of a particular case on its own peculiar facts, does not permit a comprehensive resolution of this complex matter in all its many aspects, with appropriate use of such regulatory techniques as compulsory licensing, a varied schedule of royalties, or the establishment of a royalty payment scheme.

We do not, however, suggest that the Court defer to congressional action only because that forum is more suited to making the necessary policy accommodations and enjoys more latitude in fashioning a creative solution. Very relevant is the fact that the Congress is presently undertaking the task and that strong indications point toward a satisfactory legislative resolution of the problem in the near future. Indeed, several measures were introduced in the 89th Congress [1] and promising proposals are now pending.[2] Moreover, before the Court granted certiorari in this case, the private interests involved had gone some distance in compromising their differences and the con-

[1] See Resp. Br. in Opp., pp. 28–29.

[2] In the 90th Congress, H.R. 2512 was passed by the House on April 11, 1967; it had contained a CATV copyright liability provision which was deleted prior to its enactment to permit further consideration of some aspects of the matter. See 113 Cong. Rec. 43644–43647 (April 6, 1967); *id.* at 43857 (April 11, 1967). S. 597 is presently pending in the Senate Judiciary Committee, and contains a similar provision. Senate passage of a general copyright law revision bill without such a provision seems quite unlikely.

cerned government agencies have worked hard toward agreement on a legislative solution. Those efforts will probably be arrested, however, by the pendency of the case here. Although it is anticipated that the matter must ultimately be resolved by legislation, neither side is likely to be willing to forego the significant advantage a favorable ruling by this Court would confer in the eventual compromise negotiations. Thus, in our view, decision here would not be finally determinative of the overall controversy, but would serve only to upset the existing balance, delaying and perhaps, impeding, congressional resolution of the problem.[3]

We recognize, of course, that the Court cannot follow a uniform practice of deferring its own action in cases properly brought before it merely because it is possible, or even probable, that any decision rendered will be modified by subsequent legislation. Yet there are rare instances where that course is appropriate in light of the imminence and special advantages of a legislative resolution of the underlying issue. We submit this is such an occasion. Indeed, here, if our appraisal is correct, the judgment of the courts, whoever prevails, will not rule the present parties or any others for the future, and their jurisdiction is invoked primarily to secure an advisory opinion to lay before another forum. In our view, the courts may properly decline to be so used.

These considerations persuaded the Solicitor General not to urge the grant of certiorari when the petition

[3] And, since a CATV copyright liability provision is tied to a general revision of the copyright laws, that revision will undoubtedly be delayed as well.

was pending, despite the obvious importance of the case and the government's interest in the question. The Court having acted and invited the views of the United States, we believe our responsibility to represent the public interest and our duty of candor toward the Court require us promptly to disclose our view that the Court should not now undertake to decide the question presented because further proceedings here will be likely to serve no purpose other than to retard and embarrass a desirable legislative resolution of the issue. Of course, should dispositive legislation not eventuate, the Court will be free to re-assess the appropriateness of an adjudication.

Accordingly, we suggest that the Court revoke that portion of its order granting certiorari which sets the instant case for argument following Nos. 363 and 428[4] and hold the case on its docket for a reasonable time pending legislative developments during the Second Session of the 90th Congress.[5]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

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[4] We note that those cases—involving the jurisdiction of the Federal Communications Commission over CATV operations—present discrete issues that can be resolved without reference to the copyright question.

[5] If the Court believes our suggestion has merit, it would of course be appropriate to notify the parties promptly, before they are required to print the record and prepare briefs on the merits. To facilitate prompt consideration, we are filing and serving this paper in typewritten form.

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No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

On Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT	3
A. Proceedings Below	3
B. The Function of a Receiving Antenna in Television Broadcasting	6
C. Petitioner's CATV Systems and Their Operation	8
D. The Service Areas of Television Stations	12
E. The Decisions Below	16
SUMMARY OF ARGUMENT	21
I. THE DECISION BELOW, BY A NOVEL INTERPRETATION OF THE CONCEPT OF "PERFORMING" A COPYRIGHTED WORK, GREATLY ENLARGES THE COPYRIGHT MONOPOLY IN DISREGARD OF THE MEANING AND INTENT OF THE STATUTE AND OF THE PRINCIPLES OF INTERPRETATION ESTABLISHED BY THIS COURT	26
A. The statutory words should be construed in accordance with their ordinary sense	29
B. The decision of the court below is grounded on a serious misinterpretation of this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*	33
C. The sweeping new doctrine of infringement by contribution	39
D. The erroneous analogy to broadcasting	43
E. The sweeping consequences of the new theory of contributory performance	52
II. THE MERE TRANSMISSION OF ELECTROMAGNETIC ENERGY DOES NOT CONSTITUTE A "PERFORMANCE"	55

Page

III. The Decision Below Extending the "Public Performance" Monopoly to CATV Offends the Primary Policy of the Copyright Act, Disregards the Anticompetitive Consequences That Would Flow From Its Result, and Puts the Copyright Act Into Conflict With the Policy of the Federal Communications Act and the Regulatory Scheme Established Under That Act by the F.C.C. 58

A. The primary Policy of the Copyright Act .. 58

B. Anticompetitive Consequences 62

C. The Conflict with the Policy and Regulatory Scheme of the Communications Act 67

IV. The Copyright Act and Communications Act Compel Recognition of a License Implied in Law for Simultaneous Off-the-Air Reception by the Public of a Television Broadcast Authorized by the Copyright Proprietor 72

A. License implied in law under the Copyright Act 78

B. The public's right under the Communications Act to receive broadcasts 79

C. The attempt of the court below to limit the license in law to reception with a "normal antenna" 84

D. The economic realities of the service areas of television stations 90

V. Assuming Arguendo That the General Public Does Not Have a License in Law To Receive Authorized Broadcasts, the Policies of the Copyright and Communications Act Compel the Conclusion That the Public Located Within the Prescribed Service Area of a Broadcasting Station Has Such a License To Receive the Station by the Aid of a CATV System 94

Conclusion 101

Appendix 103

CITATIONS

Cases: Page

Adams v. *Burke*, 84 U.S. (17 Wall.) 453 (1873) 74, 77
Allen Bradley Co. v. *Local Union No. 3*, 325 U.S. 797 (1945) 68
Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 365 U.S. 336 (1961) 41
Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 75, 76
Associated Music Publishers v. *Debs Memorial Radio Fund*, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F.2d 852 (2d Cir. 1944), *cert. denied*, 323 U.S. 766 (1944) 50
Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339 (1908)..27, 74, 77
Brulotte v. *Thys Co.*, 379 U.S. 29 (1964) 27, 77
Buck v. *Debaum*, 40 F.2d 734 (S.D. Calif. 1929) 61, 72, 75, 82
Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 19, 21, 25, 33, 34, 35, 36, 37, 38, 41, 45, 49, 52, 72, 73, 74, 75, 78
Cable Vision, Inc. v. *KUTV, Inc.*, 211 F. Supp. 47 (D. Ida. 1962), *rev'd on other grounds*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).. 44
Canadian Admiral Corp. v. *Rediffusion, Inc.*, [1954] Can. Exch. 382 .....31, 37, 40, 41
In re Carter Mountain Transmission Corp., 32 F.C.C. 459, 22 Pike & Fischer R.R. 193 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963) 96
Chappell & Co. v. *Associated Radio Co. of Australia*, [1925] Vict. L.R. 350 46
Columbia Broadcasting System, Inc. v. *TelePrompTer Corp.*, 251 F. Supp. 320 (S.D.N.Y. 1965) 64
Davis v. *E. I. du Pont de Nemours & Co.*, 249 F. Supp. 329 (S.D.N.Y, 1966) 50
Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1932) 59
Functional Music, Inc. v. *F.C.C.*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) 82
International News Service v. *Associated Press*, 248 U.S. 215 (1918) 67
Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925) 43, 45, 46, 57

Page

Jerome H. Remick Co. v. *General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926) 46
Jewell-LaSalle Realty Co. v. *Buck*, 283 U.S. 202 (1931) 28
Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 33
Keeler v. *Standard Folding Bed Co.*, 157 U.S. 659 (1895) ..... 77.
Law v. *National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943) 50
Mazer v. *Stein*, 347 U.S. 201 (1954) 59, 73
Mellor v. *Australian Broadcasting Commission*, [1940] A.C. 491 31
Messager v. *British Broadcasting Co.*, [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151 .....45, 46, 57
Morton Salt Co. v. *G. S. Suppiger Co.*, 388 U.S. 365 (1967) 67
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 80, 84
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 68
Richard C. Simonton, d/b/a Telemusic Co., F.C.C. Release No. 59-1032 (Oct. 12, 1959), 19 Pike & Fischer R.R. 35 (1959) 82
Scroggin & Co. Bank, 1 F.C.C. 194 (1934) 82
Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964) 27, 59, 67
Select Theatres Corp. v. *Ronzoni Macaroni Co.*, 59 U.S. P.Q. 288 (S.D.N.Y. 1943) 50
Society of European Stage Authors & Composers, Inc. v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D. N.Y. 1937) 34
United States v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) 65, 77
United States v. *Hutcheson*, 312 U.S. 219 (1941) 68
United States v. *Loew's, Inc.*, 371 U.S. 38 (1962) 59
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 59, 61, 73, 74
United States v. *Southwestern Cable Co.*, No. 363....67, 81
White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 21, 27, 29, 30, 32, 36, 44, 55, 72

STATUTES AND RULES:

Communications Act of 1934: Page

47 U.S.C. § 151 3
47 U.S.C. § 153(a) 51
47 U.S.C. § 153(b) 51
47 U.S.C. § 153(o) 3, 51, 61, 75, 80
47 U.S.C. § 303(c) 3
47 U.S.C. § 303(d) 3
47 U.S.C. § 303(g) 70
47 U.S.C. § 303(h) 3, 65, 83
47 U.S.C. § 307(b) 3
47 U.S.C. § 325(a) 3, 80, 81

Copyright Act:

17 U.S.C. § 1(c) 2, 3, 4, 27, 31, 47, 49
17 U.S.C. § 1(d) 2, 3, 4, 27, 28, 31, 47, 55
17 U.S.C. § 1(e) 30
17 U.S.C. § 101(b) 5

Copyright Act (Canada):

Can. Rev. Stat. c. 211, § 2(q) 31

Copyright Act (England):

1911, 1 & 2 Geo. 5, c. 46, § 35 31

Code of Federal Regulations:

47 C.F.R. §§ 21.710-.714 ..... 4, 81
47 C.F.R. § 73.613 45
47 C.F.R. § 73.636(a)(1) 14, 96
47 C.F.R. § 73.652 48
47 C.F.R. § 73.684 ..... 13, 94, 95
47 C.F.R. § 73.698 13
47 C.F.R. § 73.699 95
47 C.F.R. §§ 74.1001-.1083 ..... 4, 81
47 C.F.R. § 74.1033 3
47 C.F.R. §§ 74.1101-.1109 105
47 C.F.R. § 74.1103 3
47 C.F.R. §§ 91.557-.561 ..... 4, 81

REPORTS AND ORDERS OF F.C.C.: Page

Third Notice of Further Proposed Rule-making, Television Broadcast Service, 16 Fed. Reg. 3072 95
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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A 1343-67)[1] is reported at 377 F. 2d 872. The opinion of the district court (A 19-107) is reported at 255 F. Supp. 177.

JURISDICTION

The judgment of the court of appeals (A 1368) was entered on May 22, 1967. An application for extension of time to file a petition for writ of certiorari was

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[1] "A" refers to the printed Appendix filed in this Court under Rule 36.1; "E" to the printed Exhibit volume of the Appendix filed in this Court. References to the original record are indicated by "R."

granted by this Court on July 21, 1967, extending such time until September 15, 1967, and a petition was filed on September 15, 1967. The petition was granted by this Court on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the activity of a community antenna television system (CATV) in receiving off the air and instantaneously transmitting through wires the electromagnetic waves broadcast by a television station, without producing or handling the visual image or sound of television programs anywhere in the system, constitutes, within the meaning of §§ 1(c) and 1(d) of the Copyright Act, a "performance" of motion pictures broadcast by that station under license from the copyright owner, and whether any such "performance" is "in public" within the meaning of the Act, so that the operation of such a system constitutes infringement of the copyright on such motion pictures.

2. Whether the decision that the statutory copyright monopoly should be judicially applied to hold CATV systems liable for infringement is a construction of the performance right contrary to policies of the Copyright Act and the Communications Act and is such an inflexible judicial rule erroneous when it would also be inconsistent with the F.C.C.'s regulatory scheme for CATV and in conflict with one of the key elements of that scheme.

3. Whether, when a copyright owner has authorized a television station to broadcast a copyrighted motion picture, a homeowner's right to receive and enjoy that broadcast on his own television set through a receiving antenna or antenna service of his choice, such as that

provided by petitioner's CATV system, is protected by a license implied in law under the Copyright Act and/or the Communications Act.

4. Whether a CATV system such as petitioner's, located within the Grade B contour (the normal predicted service area as determined under regulations of the Federal Communications Commission) of the broadcasting station whose signals it is receiving, has a license implied in law to receive such signals and transmit them to its subscribers for viewing on their own television sets without copyright infringement liability.

STATUTES AND REGULATIONS INVOLVED

Sections 1(c) and 1(d) of the Copyright Act, *as amended* (17 U.S.C. §§ 1(c), (d) (1964)); Sections 3(o), 303(c), (d) and (h), 307 (b) and 325(a) of the Communications Act of 1934, *as amended* (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b), and 325(a) (1964)); and §§ 74.1033 and 74.1103 of the regulations promulgated by the Federal Communications Commission, *as amended* (47 C.F.R. §§ 74.1033, 74.1103); are set forth in the Appendix to this brief (pp. 103-9, *infra*).

STATEMENT[2]

A. Proceedings Below

Defendant Fortnightly Corporation (petitioner here) owned and operated two community antenna television

[2] As the court of appeals stated, "the facts concerning the operations of defendant's CATV systems are essentially undisputed, and the issue is whether, as a matter of law, defendant publicly performs telecast copyrighted motion pictures. Our review . . . is therefore not circumscribed by the 'clearly erroneous' standard. . . ." A 1346; 377 F. 2d at 874, n. 2.

systems in and around the towns of Clarksburg and Fairmont, West Virginia. Plaintiff United Artists Television, Inc. (respondent here) claims copyright in approximately 750 motion pictures and 600 cartoons which it authorized for public broadcast over five television stations—three located in Pittsburgh, Pennsylvania, and one each in Wheeling, West Virginia, and Steubenville, Ohio. Petitioner's systems in Clarksburg and Fairmont received the signals of these stations off the air (without the aid of microwave or other types of relay stations)[3] and transmitted them to the homes of the systems' subscribers so that the subscribers might view the programs on their own television sets.[4] Respondent brought this action seeking damages and an injunction on the ground that the operation of petitioner's systems constituted a "performance . . . in public" of the copyrighted motion pictures, within the meaning of §§ 1(c) and 1(d) of the Copyright Act. Each reception of each of the thousands of broadcasts

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[3] A microwave relay station is a radio transmitter which transmits radio (television) signals from one point to another in a narrow beam or straight line. The F.C.C. licenses the use of these stations singly or in a series to relay television broadcast signals over long distances. Microwave relays are used by, among others, common carriers such as American Telephone and Telegraph Company, television stations, and the national networks. A minority of CATV systems use some microwave where the CATV is well beyond the normal service area of the particular station; however, such use is subject to strict F.C.C. licensing regulations. 47 C.F.R. §§ 21.710-.714, 74.1001-.1083, 91.557-.561 (1967), *as amended*, 32 Fed. Reg. 914 (1967).

Public records of the F.C.C. show that out of 2246 CATV systems responding to a recent F.C.C. questionnaire, over 70% receive *all* signals off the air, that is, without any use of microwave. See CATV Operational and Ownership Data—1966, F.C.C. Release No. 6605, Public Notice-G, Nov. 22, 1967, chart 9.

[4] Petitioner did not sell, lease, or service the television sets. A214.

of the movies and cartoons was alleged to be a separate infringement giving rise to the statutory minimum damages of $250 under § 101(b) of the Act.

Pursuant to a pre-trial order, the issue of whether the operations of petitioner's systems constituted such a "public performance" of the motion pictures, and the issue of whether these operations in aiding reception by members of the public of broadcasts licensed by the copyright owner were in any event protected from the copyright-infringement liability by a license implied in law, were tried separately from unrelated issues.[5] Formal assumptions were made that respondent owned valid copyrights in certain motion pictures, that these motion pictures were telecast by the television stations in Pittsburgh, Wheeling, and Steubenville, and that the signals of these stations were received by petitioner's two CATV systems and made available to the systems' subscribers. It was further assumed that the telecasts with respect to which petitioner was alleged to have infringed had been duly licensed and authorized by respondent through license contracts with the television stations. A 188.[6]

Respondent stipulated that the broadcasting stations were not guilty of copyright infringement by reason of the telecasts in question; respondent also stipulated that it did not contend that any of the homeowners who viewed the programs through subscribing to petitioner's systems were guilty of copyright infringement. A 27-28, 809, 817. No contention was made that respondent or anyone else owned a copyright in the elec-

[5] Pre-trial Orders Nos. 1 and 2; A 174 and 182.

[6] No assumption was made, and there was no evidence, that any of the broadcasts of respondent's movies or cartoons were actually seen or heard by any subscribers.

tromagnetic waves received and transmitted to the subscribers. R 5459.

After trial, the district court issued an opinion and order dated May 23, 1966, holding that petitioner's CATV systems infringed respondent's copyrights by publicly performing the copyrighted motion pictures, and that these public performances were not licensed as a matter of law. A 19-107, 255 F. Supp. 177 (S.D.N.Y. 1966). On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the court of appeals affirmed in an opinion dated May 22, 1967. A 1343-67, 377 F. 2d 872 (2d Cir. 1967). The opinions of the two courts are discussed at pp. 16-20 *infra*.

B. The Function of a Receiving Antenna in Television Broadcasting

A television station is licensed to use the publicly-owned spectrum to broadcast, but has no obligation to assure reception in the station's service area; it is up to members of the public to provide their own means of reception. To much of the American public, television requires merely the purchase of a receiving set. In order to function, however, every television set must have a receiving antenna and a connection from the antenna to the set. The antenna which is built into every television set may be sufficient for reception of nearby stations. In other instances or in less advantageous locations, so-called "rabbit ears" antennas resting on the top of the television receiver are necessary for adequate reception. Where the stations are at greater distances, or the receiving location is disadvantageously situated behind a hill or other blocking terrain or among buildings, it may be necessary (and it is common) to use a better antenna and to place the antenna on a pole or rooftop, with a longer wire or

cable connecting the antenna to the set. Sometimes an amplifier becomes necessary and may be mounted on the antenna mast to amplify the signal transmitted to the set and thereby improve reception.

An individual member of the public can improve the quality of his television reception by installing a larger or more sentitive antenna, or by placing it at a higher and more advantageous location. The basic limiting factors are the amount of money he wishes to spend on his antenna installation and the quality of reception he will accept. More elaborate antenna installations and cooperative systems are common in suburbs and rural areas. Master antennas for a single building such as an apartment house, or for a group of buildings, are common in metropolitan areas. CATV systems such as petitioner's perform the same function as the homeowner's antenna and the connecting line to his set (A 641-43), the principal difference being that the master antenna and connecting line are made available by an entrepreneur to a number of set owners for a fee.[7]

The towns of Clarksburg and Fairmont are located about 18 miles apart in north-central West Virginia. Fairmont is about 67 miles from Pittsburgh, 52 miles from Wheeling, and 65 miles from Steubenville; Clarksburg is about 82 miles from Pittsburgh, 57 miles from Wheeling, and 74 miles from Steubenville. A 32. The terrain surrounding the two towns (and the terrain within Fairmont itself) is hilly, and most of the residences in the two towns are located in valleys. For these reasons, television reception there has not been easy. A 33 (district court opinion), 910-13, 1171. Ac-

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[7] Statistics released by the F.C.C. show that 1623 CATV systems out of a total of 2162 systems reporting are in towns with a population of less than 10,000. CATV Operational and Ownership Data—1966, supra note 3, Chart 2.

cordingly, since the early 1950's many residents of the two communities have utilized CATV systems, including the petitioner's and others, and there are a number of cooperative antenna systems as well in and around these communities. A 277-78, 1198-1200, 1239, 1285-86. However, there is evidence in the record that some residents of the two towns did use their own antennas (A 272-77, 907-10, 1197-98, 1230-32) and could receive some or all of the Pittsburgh, Wheeling, and Steubenville stations with such antennas, A 910-13, 1161-77; Ex. M2, E 413, R 2406-08.[8]

C. Petitioner's CATV Systems and Their Operation

Petitioner's system in Clarksburg and Fairmont were started in 1952. They received the broadcast signals off the air, without microwave or other type of relay. The court of appeals provided the following short description of the systems (A 1346-47):

> "Both the Clarksburg and the Fairmont CATV systems receive broadcast television signals by means of tall antennas on hilltops some two and a half and one and a half miles respectively from the city centers, and transmit them through coaxial cables strung along utility poles and smaller 'house drop' cables to television sets on subscribers' premises. The television signals of each station carried by a system are received by a separate antenna specifically designed and oriented to receive them.[9] The signals of all the stations car-

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[8] See discussion at note 111 *infra*.

[9] The receiving antennas used by the systems were of a common variety available in radio stores and widely used by the public. A 208-09, 524-25, 880-81 (testimony of both parties' experts). An antenna is "oriented" by pointing it toward the signal source, thus increasing the sensitivity or "gain" of the antenna. A 524-25.

ried by the system are then transmitted together over its cables, without any editing or selection of programs, and the system has no way of knowing which program, if any, a subscriber has turned on. Both CATV systems carried three stations from their inception in 1952 to 1958, and five thereafter. Although there are local television broadcasting stations in Clarksburg and Weston, West Virginia, the CATV offerings attracted substantial numbers of subscribers to both systems.[10] At the end of 1963, the Clarksburg system had 9571 subscribers and the Fairmont system 6047. The number of subscribers of each system in 1960 was over half the number of occupied housing units counted by the United States Census of Housing in the area they served.

"Defendant, like its predecessors, is a private corporation operating the CATV systems for profit under municipal franchises. Each subscriber pays an initial charge, which is reduced if his premises are already connected to the CATV system, and fixed monthly charges.[11] Additional charges are made for connecting additional sets. Different charges, sometimes individually negotiated, have at

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[10] Within the period covered by this action, the two "local" stations were carried by petitioner's CATV systems in lieu of the stations involved in this case. WBOY, located in Clarksburg, was carried by the Clarksburg system beginning in 1962, and WJPB, located in Weston (about 15 miles from Clarksburg), was carried by both systems from March, 1964. A 39 (district court opinion), 207.

[11] The contract between petitioner and its subscribers obliged petitioner "to extend its Community Antenna System . . . to make available television signals to the Subscriber at the following premises . . . ." Exs. 47, 51 and Q2, E 168, E 176, E 417, A 587, 592, 1258-61. The contract related only to such television "signals," and the charges under the contract were unrelated to programs viewed by the subscriber or to the subscriber's use of his television set. See para. II-2.1 of Stip. No. 2, A 218.

times been established for hotels, motels, and other nonresidential subscribers. Both the Clarksburg and the Fairmont systems often advertised the variety of stations and programming they made available, at times in connection with particular program. Both systems conducted mail ballots among their subscribers to determine which stations they preferred to receive."

The court of appeals also gave the following summary of the technology involved in television broadcasting and reception and in the operation of petitioner's systems. A 1347-49.

"Television broadcasting equipment first translates the sight and sound of the program being broadcast into two voltages, the video signal, which measures the intensity of light at each spot on a photosensitive screen inside the camera as it is scanned by an electron beam, and the audio signal which measures the intensity of sound. These two changing voltages are then encoded in a radio frequency carrier wave for broadcasting; the video signal is used to modify, or modulate the amplitude, or maximum strength, of the carrier wave, and the audio signal is used to modulate the frequency of the carrier wave. The modulated carrier wave is then broadcast by an antenna as electromagnetic radiation. When this radiation strikes a home television antenna, it induces a voltage between the antenna terminals which reproduces the modulated carrier wave. The reproduced carrier wave is then conducted into the television set, and there demodulated to yield reproductions of the video and the audio signals. The video signal controls the intensity of a scanning electron beam, which reproduces on the electroluminescent interior of the television tube the image seen by the camera, and audio signal controls the speaker of the set. Since the broadcast radiation propagates at the

speed of light, the whole process of television broadcasting and reception consumes a fraction of a second.

"The radiation broadcast by a television broadcasting station, when it strikes the corresponding antenna of one of defendant's CATV systems, induces in it a reproduction of the station's modulated radio frequency carrier wave just as it does in a home antenna. The CATV system's 'head-end equipment,' housed in a small building near the antennas, then amplifies the carrier wave, converts it if it is a high-frequency, or high-band, VHF wave (channels 7 to 13) to one of the low-band VHF channels (2 to 6) in order to reduce losses in transmission through the system's coaxial cables, narrows its frequency range, and then propagates it as electromagnetic radiation through the system's cables. The radiation, amplified by numerous trunkline and distribution amplifiers along the cables, is transmitted at nearly the speed of light to the terminals of subscribers' television sets, in most cases through matching transformers.

". . . Thus broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs." [12]

As the statement of the court of appeals makes clear, petitioner's CATV systems dealt only with electromagnetic energy, and at no point with the sights or sounds of television programs. They did not change the sights and sounds of programs into electromagnetic energy,

[12] The CATV system in Clarksburg was prohibited by its franchise from the town of Clarksburg from being other than a reception service for broadcast signals. See Sec. 12 of Ordinance, Ex. 3, E. 11, R 135, A 229-30, 1269. The systems were not equipped to, and did not make, recordings of telecasts. A 218.

as the broadcasting station does, nor did they change electromagnetic energy into the sights and sounds of programs, as the television set does. Petitioner did not provide, or have any control over, the subscribers' television sets (A 214, 218), and therefore did not provide to any member of the public an audible and visible rendition of any television program.

As the court of appeals stated, the carrier wave broadcast by the television station in the form of electromagnetic energy strikes petitioner's receiving antennas and induces in the antenna an electric current which is a "reproduction" (*i.e.*, has the same electrical characteristics) of the broadcast carrier wave, "just as it does in a home antenna." A 1348. Petitioner's other equipment "then propagates it [the carrier wave] as electromagnetic radiation through the system's cable." A 1348. This reception and transmission of electromagnetic energy—a process likewise performed by a rooftop antenna, a master antenna of the kind commonly used on apartment buildings, or a rabbit ears antenna attached to the television set itself (A 641-43)—is the sole activity by which petitioner's systems are alleged to have "performed" the copyrighted motion pictures.

D. The Service Areas of Television Stations

Television signals propagate outward from the broadcast station's antenna, their intensity or strength gradually decreasing as the distance from the transmitting antenna increases. The predicted service area of a television broadcasting station is calculated, pursuant to regulations of the Federal Communications Commission, in terms of the station's "Grade A" and "Grade B" "service contours." The Grade B con-

four delimits that area at the perimeter of which television reception of "a quality acceptable to the median observer" is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations. (For the smaller Grade A contour, the latter figure is 70 percent.)[13] An applicant for a television station construction permit is required to file with the F.C.C. a map showing, by means of these plotted contours, the areas to which it will provide service. Ex. D2, E 348, 378-79, R 1678-79. A revised map must be filed any time the station changes power, antenna height, or antenna location. The contour maps are part of the public file at the Commission for each station.

The Grade B contour is generally accepted by the F.C.C. and the industry as the practical measure of a station's service area. The F.C.C. has used it as a basis for regulations. A recent and most pertinent example is the requirement of the F.C.C.'s comprehensive regulatory scheme for CATV that a CATV

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[13] "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90 percent of the time at the best 70 percent of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90 percent of the time and 50 percent of the locations." F.C.C. *Sixth Report and Order, Television Allocations*, 17 Fed. Reg. 3905, 1 (part 3) Pike & Fischer R.R. 91:601, ¶ 97 (1952) (hereinafter cited as *Sixth Report and Order*). These contours are plotted on the basis of propagation charts and rules set forth in the F.C.C. regulations as applied to data concerning the transmitter (*e.g.*, the power of the transmitter and the height of the transmitting antenna) and the nature of the receiving equipment. 47 C.F.R. § 73.684 (1967); A 868-71; see note 122 *infra*. The charts are based on expected signal field intensities which would be received on an antenna at a height of 30 feet above the ground. 47 C.F.R. §§ 73.684 and 73.698 (Figures 9 and 10) (1967).

system carry upon request the signal of any station "within whose Grade B contour the system is located."[14] Of course, acceptable reception does not end at the B contour; as one moves farther out, the number of locations at which such reception exists simply declines gradually.[15]

In the present case there is no dispute—as there could not be, in view of the public nature of the information—about the relationship between petitioner's CATV systems and the B contours of the five television stations. As the court of appeals stated: "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." A 1364.[16] Thus, in one-half of the

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[14] *Second Report and Order, Community Antenna Television Systems,* 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717, ¶¶ 66-67 (1966) (hereinafter cited as *Second Report and Order*). See discussion at pp. 94-100 *infra.* See also 47 C.F.R. § 73.636(a)(1) (1967) which prohibits the granting of a television broadcast license to a person owning another television station where an overlap of Grade B contours would result (the so-called "duopoly" rule).

[15] Respondent has attempted to argue that the so-called "radio horizon" marks "the broadcasting stations' actual service areas". Respondent's Brief in Opposition to the Petition at 21. The Grade B contour is beyond the station's "radio horizon"—defined as the point where a line drawn tangential to the earth from the top of the transmitting antenna touches the earth. A 5056-60, 1177-78. Because of a "bending" of the electromagnetic waves (they follow the curve of the earth for some distance), reception beyond the radio horizon is normal, expected, and experienced. A 861-64, 1162-78; Ex. M2, E 413.

[16] Specifically, Fairmont is well within the B contour of WTRF in Wheeling—indeed, it is about equally close to the Grade A contour. Ex. F2, E397, R 1680. Fairmont is also well within the Grade B contour of WTAE in Pittsburgh. Ex. I2, E409 R 1682. And Fairmont is on the Grade B contours of WSTV in Steubenville and KDKA in Pittsburgh. Exs. E2 and G2, E394,

ten system-station relationships presented, petitioner's subscribers (and its systems) are within the Grade B contour of the station whose broadcast signals the systems received and transmitted to their subscribers.

Petitioner at the trial offered to prove that its systems were also within the market areas of the five stations as determined by the economics of the broadcasting industry. The proof would have shown that petitioner's CATV subscribers were included in the contemplated audience of the stations from the points of view both of the advertiser who buys time on the station and of the copyright owner who licenses programs for broadcast.[17] It would have shown that the royalties exacted by respondent from the five stations took into account the anticipated reception of the

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E401, R. 1680. The only one of the five stations whose Grade B contour does not encompass or touch Fairmont is WIIC in Pittsburgh (and it does not fall far short). Exh. H2, E405, R. 1682. Clarksburg, being 18 miles south of Fairmont, is not quite as close to the five stations. Nevertheless, like Fairmont, it is well within the Grade B contour of WTRF in Wheeling, and about as close to the Grade A. Ex. F2, E397. Clarksburg is also very close to the Grade B contours of WSTV in Steubenville and WTAE in Pittsburgh. Exs. E2 and I2, E394, E409. Nor is it far from the Grade B contours of any of the other stations.

[17] The offer of proof (A 1312-24), which was rejected by the district court (A 1327), included such basic economic facts of the television industry as the relationship between a station's circulation (number of viewers) and the rates it can charge and receive from advertisers. The greater the circulation the greater the rates. The proof would have shown that respondent, in setting its prices for licensing its motion pictures to television stations, takes account of the station's circulation and advertising rates, and that the greater a station's circulation and the higher its rates, in general the higher the royalty respondent may demand and receive from the station in licensing it to broadcast respondent's motion pictures.

licensed broadcasts by the stations' entire audience, including petitioner's CATV subscribers, so that respondent had in fact already been compensated for the reception of the licensed broadcasts by not only the public, but the specific members of the public who subscribed to petitioner's CATV systems.[18]

E. The Decisions Below

1. *The district court* relied principally on what it deemed to be the electronic and technological functions of petitioner's equipment.[19] The court emphasized the CATV systems' acts of "electronic reproduction" (A 49, 73, 255 F. Supp. at 192, 204) of the broadcast

[18] Petitioner offered to prove that the statistical method used by the television rating services in determining a station's circulation includes homes connected to CATV systems, that subscribers to petitioner's CATV systems in Clarksburg and Fairmont were credited to the circulation of the five stations here involved, and that those stations knew of, contemplated, and advertised reception of their telecast by CATV subscribers in and around Clarksburg and Fairmont. A 1322-23. Petitioner would also have offered documentary evidence from respondent's files to support its offer. See, *e.g.*, letter to respondent from one of the stations involved (WTRF, Wheeling), dated in 1959, referring to the importance of CATV reception to the station and to the effect of such reception in increasing the rates paid respondent for the licensing of its motion pictures. R 4292.

[19] "The finding that defendant's activity constituted a performance was based on an analysis of the electronic process employed in the defendant's operation. The court found the 'essential feature' of CATV's operation to be that when it received the signals from the TV station and fed them into the amplifying equipment which formed part of its transmission system, it 'created output signals which are replicas in electronic terms of the input signals' and which 'duplicate and reproduce : . . the patterns . . . that originated from the broadcast antenna . . .' The court found that this process of duplication constituted an infringing performance." Note, *CATV and Copyright Liability*, 80 *Harv. L. Rev.* 1514, 1517 (1967) (footnotes omitted).

signals through the operation of the vacuum tubes in the systems' amplifiers. A 47-49, 255 F. Supp. 191-92.[20] Apparently recognizing that such an electronic function of a vacuum tube was not encompassed within the commonly understood meaning of the statutory words "to perform," the court said:

> "On the premise that words are only the means of communicating thoughts or ideas, it may be contended, with a degree of validity, that the words 'to perform,' as commonly used in everyday speech by the average layman, are not intended to encompass the aggregate or composite of the acts of [petitioner's systems]...." A 67, 255 F. Supp. at 201.

The court rejected the common meaning of the statutory language, however, in favor of a process of statutory interpretation which it described as "a judicial application of the principle of semantic extension." A 105, 255 F. Supp. at 213, n.20. The court explained (A 72, 255 F. Supp. at 204):

> "When a CATV system brings the acting or the playing to the audience and makes available to that audience a reproduction of a primary performance (as embodied in the phonograph record, the magnetic tape, or the film, etc.), it is executing a function *that is so closely akin in result* to the primary performance of the copyrighted

[20] "The vacuum tubes in each active or energized electronic unit in defendant's systems produce in the flow of locally supplied electric current a reproduction or duplication of the voltages that were originally supplied to the grid of each vacuum tube as the input signals." A 48, 255 F. Supp. at 192. This technological fact about the operation of a vacuum tube (or transistor) was identified by the court as "the essential feature of defendant's act of electronic reproduction." A 49, 255 F. Supp. at 192.

> work that, for purposes of protecting the copyright proprietor's performance monopoly, the court finds that it *should treat the situation as if there were a classical performance, and attach to it the consequences resulting from an unauthorized performance.*" (Emphasis added.)

On the question whether public reception of broadcasts licensed by the copyright owner is protected by a license implied in law under the Copyright Act and/or the Federal Communications Act, the district court stated simply: "The question being not whether there *is* an implied in law license to perform publicly for profit but whether there *should* be, this court holds that there should not." A 88, 255 F. Supp. at 211 (emphasis in original).

2. *The court of appeals* brushed aside the technological grounds on which the district court had relied, stating that "the result produced by defendant's systems constitutes a public performance, and . . . the technical means by which the result is produced are irrelevant to this issue." A 1357, 377 F.2d at 880, n.9. The "result" which the court of appeals found crucial, and which it held to be "fairly characterized as a public performance infringing the copyrights," was "the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets" of petitioner's subscribers. A 1350, 377 F.2d at 876. The operations of the CATV systems were held to constitute a "performance" of the motion pictures because of "the magnitude of [petitioner's] contribution" to that "result" taking place in the homes of its subscribers (A 1353, 377 F.2d at 878) even though the reception and viewing by the subscribers were conceded by respondent to be noninfringing.

The court of appeals conceded that "no legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's" (A 1350, 377 F.2d at 876), and gave virtually no consideration to the meaning of the statutory term "perform". It stated that its conclusion, based on the "result produced" and the "magnitude" of petitioner's "contribution," was reached "in light of prior decisions and of the policies of the Copyright Act." A 1349, 377 F.2d at 876. So far as prior decisions were concerned, the court relied mainly on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). So far as the policies of the Copyright Act were concerned, the only policy recognized by the court as relevant to the issue of "performance" was the Act's "fundamental purpose . . . to protect copyright proprietors against dilution of the market for their works" (A 1353, 377 F.2d at 878)—a policy requiring, in the court's apparent view, exclusive consideration of the extent to which "a television broadcast of a copyrighted work harms the copyright holder." A 1355, 377 F.2d at 879.

On the issue of a license implied in law, the court of appeals recognized that "the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression.". A 1360, 377 F.2d at 881. The court proceeded to deny the existence of such a license on the ground that: "In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences . . . ." A 1362, 377 F.2d at 882. Thus

the copyright owner must be allowed, in the court's view, "the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas." A 1363, 377 F.2d at 883. With respect to petitioner's argument that in the absence of an implied license petitioner's subscribers "will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service" (A 1363, 377 F.2d at 883), the court responded that "whatever force this 'double payment' contention may have, it must be made to Congress," inasmuch as "it involves purely legislative considerations" and did not recognize that any relevant policy of the Copyright Act was involved. *Ibid.*

The court of appeals went on, however, to place a limitation on its holding denying the existence of a license implied in law. It sanctioned the copyright owner's right to collect a second royalty through a CATV system only where the CATV system's subscribers "could not receive the licensed broadcasters' signals satisfactorily" by "normal antennas" or "normal rooftop antennas." A 1363, 1366, 377 F.2d at 883, 884. The court stated (A 1366, 377 F.2d at 884):

> "A different case might be presented which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work." (Footnote omitted.)

SUMMARY OF ARGUMENT

I

As the court of appeals recognized, petitioner's CATV systems, in receiving broadcast television signals off the air and transmitting them by wire to the homes of the systems' subscribers, deal only with electromagnetic energy and in no respect with the sights or sounds of television programs. In holding, nevertheless, that petitioner's systems "perform" copyrighted motion pictures "in public," the court below construed the limited statutory monopoly in a manner contrary to the principle established by this Court in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), that the words of the Act should be interpreted in accordance with their "ordinary sense." Nothing in the legislative history, the language of the statute, or the precedents supports an interpretation that a work is "performed" by operations such as those of petitioner's systems, which do not make the motion pictures audible or visible and do not deal with their content in any way. *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), relied on centrally by the court below, does not support its decision; there the hotel received an unauthorized broadcast and made it audible throughout the hotel on equipment which it owned. Petitioner's CATV systems only receive the broadcast signal and conduct the electromagnetic energy to the homes of the subscribing members of the public; the subscribers who choose to use CATV to assist their television reception view the program on their own television sets. *Jewell-LaSalle* is completely consistent with the "ordinary sense" construction of performance since, as this Court emphasized, the pro-

gram was made audible on the hotel's equipment; the decision does not compel or support the court of appeals' conclusion that "performance" may be found on the basis of the "magnitude" of a "contribution" to the "viewing" of sight and sound by someone else on his own television set.

The rationale of the court below is really a new theory of contributory infringement. Unlike the standard theory, it requires no direct infringement, but is applied here in a situation where both the broadcast and the viewing are conceded not to be infringing. This vague new theory of performance by reason of the "magnitude" of a party's "contribution" to the "result" of "simultaneous viewing" by the subscribers on their own sets will greatly expand the limited monopoly granted in carefully circumscribed statutory language; it will permit copyright owners to restrict, and impose an additional toll on, reception of public broadcasts by members of the public when those citizens decide to enlist the aid of a master antenna or CATV. Thus, apartment house master antennas, so common in our cities, and all cooperative antenna systems, as well as CATV systems, will be subjected to the control of the copyright owner.

The attempt by the court below to justify its theory by analogy to the copyright-infringement liability of broadcasters fails as a matter of law and fact. The cases imposing copyright liability on broadcasters make it clear that the "performance" takes place in the broadcaster's studio—originally "live," but now more often by the playing of a film, tape, recording, or a program supplied by a network—and that the broadcaster's transmission to the public of the electromag-

netic waves into which he has converted the sights and sounds of the program serves to make the studio performance "public." The essence of broadcasting, as the F.C.C. has said, is program origination. A broadcaster is legally responsible for selecting and procuring programs to broadcast for reception by the public. A CATV system, in contrast, is admittedly not a broadcaster. It is not a program originator. It merely receives broadcast signals and transmits those signals to the subscribing members of the public so that they can view the programs in their homes on their own sets.

II

Respondent argues for a theory of performance different from that of the court below, independent of the viewing by the subscribers, based simply on the transmission of electromagnetic energy. This is a variant of respondent's technological argument rejected by the court of appeals. The notion that a "performance" of a motion picture takes place through the transferring from one location to another of electromagnetic energy, in which no one claims or can claim a copyright, expands and distorts the statutory monopoly. Respondent's transmission theory might have an even broader impact than the contributive theory of the court below, since every common-carrier and electronic communications service and, indeed, every television set and antenna installation, and numerous other present and future services for electronic transmission of data, involve transmission of electromagnetic energy. The transmission theory also fails to recognize the holdings of the broadcaster cases that it is not the transmission of electromagnetic energy *per se* which is a performance under the Act.

III

To the extent that it took policy considerations into account, the court below extended the "performance" right to the operations of a CATV system by considering exclusively the secondary policy of the Copyright Act—that of rewarding the author—and without considering the Act's primary policy of making the work available to the public. Once the author has collected his royalty for releasing a particular embodiment of the work to the public, as he has here by licensing the broadcast for reception by the public, the primary policy applies to preclude a construction of the "performance" right which would impose on the public a second toll for reception of the same broadcast. The extension of the statutory monopoly in violation of the primary policy of the Act would in this case lead to severe anticompetitive consequences, which have been pointed out in Congressional testimony by the Department of Justice. The lower court's expansive construction of the copyright monopoly is also in conflict with the policy of the Federal Communications Act, under which broadcasting is intended for free public reception. In addition, imposition of copyright restrictions on CATV would bring the Copyright Act into direct conflict with a key element of the F.C.C.'s regulatory scheme for CATV—the requirement that CATV systems "carry" upon request the signals of television stations within whose "B contours" they are located—which the Commission has found to be in the public interest.

IV

Although these policy considerations are important in construing the exclusive rights under the limited monopoly—especially where there is nothing in the

statutory language, legislative history, or precedent to compel a contrary interpretation—they are also pertinent, and controlling, on the question, specifically reserved by this Court in *Jewell-LaSalle,* whether the public has a license implied in law to receive off the air for viewing on their own sets broadcasts licensed by the copyright proprietor (and to seek the aid of an antenna service such as petitioner's in order to enjoy this right to receive). The copyright owner should not be permitted to impose a second royalty on the public for enjoyment of the broadcast which he has specifically authorized for reception by the public. Respondent's release of a particular embodiment of the copyrighted work, by licensing a broadcast of its motion picture by a particular television station for reception by the public, must be held to carry with it a license implied in law for the public to receive and enjoy that broadcast. And the public's license to receive cannot be restricted to a "do it yourself" basis, but must also protect its right to seek the aid of a CATV system in the reception, without thereby incurring or imposing copyright-infringement liability. When a copyright owner exploits his work through broadcasting, he subjects his rights to the legal and economic structure of the industry and must be held as a matter of law to have licensed the public for whom the broadcast was intended, including members of that public who choose to receive through the aid of CATV.

The court below indirectly recognized the public's right to receive, but limited that right by proposing a standard whereby the operation of a CATV system would be an infringement unless the system could demonstrate that its subscribers "could receive" with "normal rooftop antennas." The court's assumption

that none of the subscribers to petitioner's CATV system met this test is clearly erroneous on the present record. The test, in any event, is vague and unworkabl and unwarranted in law. The public has the right to use whatever kind of antenna it chooses to receive a broadcast off the air, and there is no basis for suggesting that one particular technical and variable fact —the antenna selected for reception—is a reasonable way to mark the limit of the public's right to receive.

If a court is to construct a limit on the public's right to receive a broadcast off the air, it would be more reasonable to use the F.C.C.'s B contour as a measure of a station's normal coverage area. This standard, which the Commission has used in its regulation of CATV, is certain, readily available, and more in accordance with the economic facts; it would provide a more workable measure of expected coverage, if such a limit on the public's right to receive were deemed necessary.

ARGUMENT

I.

THE DECISION BELOW, BY A NOVEL INTERPRETATION OF THE CONCEPT OF "PERFORMING" A COPYRIGHTED WORK, GREATLY ENLARGES THE COPYRIGHT MONOPOLY IN DISREGARD OF THE MEANING AND INTENT OF THE STATUTE AND OF THE PRINCIPLES OF INTERPRETATION ESTABLISHED BY THIS COURT.

The importance of this case and the multitude of its ramifications make it easy to forget that the basic legal question involved is one of statutory interpretation. A statement made by this Court in a comparable case half a century ago provides an appropriate guidepost. The Court there, having reviewed other matters

in its opinion, turned to what it deemed the decisive considerations and stated: "In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory." *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 15 (1908). The copyright monopoly, a "wholly statutory" creation, is a limited monopoly authorized by the Constitution and granted by Congress as an exception to the general principle against monopolies. As such it "ought to be reasonably construed with a view to effecting the purposes intended by Congress," and it "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant." *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346 (1908). The public policy of the Copyright Act is embodied not only in the monopoly granted but also in the limits placed on those exclusive rights. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *cf. Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964).

In this case, the relevant provisions of the Copyright Act are §§ 1(c) and (d), which grant exclusive "performance" rights relating to nondramatic and dramatic works.[21] Section 1(c) grants the copyright owner the exclusive right, with respect to non-dramatic

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[21] The courts below did not rule on the charge made in respondent's complaint that petitioner's systems infringed respondent's exclusive right to make copies. A 63. Thus, the issue before the Court is whether petitioner infringed respondent's performance monopoly.

works, "to play or perform it [the copyrighted work][22] in public for profit," and § 1(d) grants the exclusive right, with respect to dramatic works, "to perform or represent the copyrighted work publicly . . . ." Petitioner cannot be held liable for infringement unless its CATV systems "performed" respondent's motion pictures.[23]

As the court below found, "broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs." A 1349. Yet the court held that "the operations of defendant's CATV systems constitute . . . performances." A 1367. In so doing, it did not analyze what the statutory term "perform" means, and did not try to explain how the operations of petitioner's systems in receiving and transmitting electromagnetic energy could be reasonably described as a "performance" of motion pictures.[24]

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[22] Petitioner contended below that the exclusive rights granted by § 1(c) did not extend to the nondramatic motion pictures involved (cartoons), since they were not "literary works" within the purview of the section. See *Nimmer on Copyright* § 107.1 at 399 and § 109.4 at 439 (1967). The district court rejected this contention without discussion.

[23] Although both subsections also utilize the verbs "exhibit," "represent," "produce" and "reproduce," this Court has made clear that they all describe a single performance right. "The Copyright Act confers two monopolies—that of making copies and that of giving public performances for profit." *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U.S. 202, 204 (1931).

[24] The court's rationale seems to have been that the burden was on petitioner to show that its operations were *not* within the statutory monopoly. The court's whole discussion is cast in the terms in which it opens: "Defendant contends that its CATV systems should not be held to have performed plaintiff's copyrighted motion pictures in public because . . . ." A 1349.

A. The Statutory Words Should Be Construed in Accordance With Their Ordinary Sense

This Court has set forth the guiding principles for construing the terms of the Copyright Act. In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), the Court was confronted with a comparable case involving the claimed applicability of the copyright monopoly to a new industry which "has developed rapidly in recent years," so that the question was "one of very considerable importance." *Id.* at 9. The question was whether player-piano music rolls and other devices for mechanically reproducing music (including phonograph records) were "copies" of the musical compositions within the terms of the Act. Some of the same arguments made on behalf of respondent here were urged by the plaintiff there. But this Court, while recognizing that "it may be true that the use of these perforated rolls, in the absence of statutory protection, enables the maufacturers thereof to enjoy the use of musical compositions for which they pay no value," responded that "such considerations properly address themselves to the legislative and not to the judicial branch of the Government." *Id.* at 18. The Court held, unanimously, that the devices did not infringe because they were not "copies within the meaning of the copyright act." *Ibid.*

In so ruling, the Court made clear that the terms in which Congress has defined the exclusive rights granted to the copyright proprietor are not to be taken as elastic words of art into which a court can pour any meaning that it feels will best effectuate the objective of rewarding the copyright owner. Rather, as the Court repeatedly stated, the words are to be interpreted on the basis of their "ordinary sense" (*id.* at 16), "com-

mon understanding" (*id.* at 17), and "ordinary signification" (*id.* at 12)—the sense in which they are "generally understood" (*id.* at 17).[25]

The court of appeals here ignored *White-Smith* and gave not one word of consideration to the "ordinary sense" or "common understanding" of the word "perform."[26] If the court had considered the ordinary meaning of the word, it would have been compelled to recognize that the normal conception of "performing"

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[25] The aftermath of the *White-Smith* decision is also instructive here. Congress did act to subject the mechanical devices to copyright-infringement liability, but it significantly did not adopt the rule of total liability which this Court had rejected. The Committee drafting the legislation at first intended to do just that, but changed its mind after hearings disclosed the possibility of severe anticompetitive effects. As the House Report stated:

> "It was at first thought by the committee that the copyright proprietors should be given the exclusive right to do what they pleased with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-music trust. . . ." *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 967 (1967).

Accordingly, Congress in the 1909 legislation that became section 1(e) of the present Copyright Act, while bringing mechanical reproductions within the Act (as a separate category and not within the term "copy"), imposed a system of compulsory licensing at a fixed royalty rate; it also established a method for collecting the royalty, enacted an exemption for coin-operated machines, and subjected the whole new right to a grandfather clause. See 17 U.S.C. § 1(e) (1964).

[26] The district court went further and expressly rejected this Court's example, virtually conceding that the word "perform," "as commonly used in everyday speech by the average layman," would have to be held not to encompass the operations of petitioner's systems. A 67; see p. 17 *supra*.

a work, as applied to a sound motion picture, implies the making of an audible and visible representation or exhibition of it. This is the basis on which the term has been expressly defined in copyright statutes of other English-speaking countries.[27] That this "ordinary signification" of "perform" was the meaning intended by Congress in §§ 1(c) and 1(d) is also indicated by the structure of those sections[28] and by their legislative history. The latter makes clear that Congress acted to solve the problem of dramatic works being "performed" on stage and in the process transcribed or recorded for the purpose of producing un-

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[27] The Canadian Copyright Act, *Can. Rev. Stat.* c. 211, § 2(q) (1952), states: " 'performance' means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication." See *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can. Exch. 382, 403, discussed in more detail at p. 37 *infra*. The English Copyright Act of 1911, § 35(1), contained an identical definition. Copyright Act of 1911, 1 & 2 Geo. 5, c. 46, § 35. See also *Mellor* v. *Australian Broadcasting Commission*, [1940] A.C. 491, 500.

[28] The exclusive right of performance is granted in sections 1(c) and 1(d) not in some abstract, disembodied form, but with the closest possible reference to the copyrighted work. Section 1(d) reserves to the copyright proprietor the exclusive right to perform or represent publicly "the copyrighted work," to make a record "thereof" from which "it" may be exhibited, performed, or reproduced, and to exhibit, perform, or reproduce "it." Similarly, section 1(c) grants the right to play or perform "it," and to exhibit, represent, produce, or reproduce "it." Thus, there must be something amounting to a public performance of "it," the copyrighted work, which in this case means the motion picture.

authorized "performances" of the same nature.[29] While this does not mean that such a stage presentation is the only kind of performance the Act protects, it demonstrates that Congress used the word "perform" (as in *White-Smith* it was held to have used the word "copy") in its ordinary and commonly understood sense—meaning a rendition of the work which can be perceived by the senses of an observer.

Applying the "ordinary sense" principle of the *White-Smith* case, the conclusion must follow that petitioner's CATV systems did not "perform" respondent's motion pictures. The systems did not make any of the motion pictures audible or visible; they did not originate the programs or handle or exhibit the sights or sounds of programs in any way. They merely received on their antennas, and transmitted through wires to their subscribers, electromagnetic energy, on which no one claims or can claim a copyright.[30] To

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[29] As is shown by the Committee Report on the 1909 Act, the moving force behind enactment of these provisions in the 1909 Act was the complaint of dramatic authors and producers against the practice whereby

> "upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to someone who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority from the author, would give public performances of the work." *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 963-64 (1967).

[30] Plaintiff conceded that "No contention has been made that plaintiff, or for that matter anyone else, owns a copyright in the electromagnetic waves broadcast by the television stations and retransmitted by defendant's CATV systems." Plaintiff's Supplemental Memorandum on Copyright Law, R 5459.

hold that these CATV systems "performed" motion pictures departs from the meaning and intent of the statute and from the principle of construction established by this Court.[31]

B. The Decision of the Court Below Is Grounded on a Serious Misinterpretation of This Court's Decision in Buck v. Jewell-LaSalle Realty Co.

In holding that petitioner's CATV systems "perform" respondent's motion pictures, the court below rested its conclusion squarely on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). If the court below was wrong in thinking that *Jewell-LaSalle* compels or justifies the result here, its decision cannot stand.

In *Jewell-LaSalle*—which the court below described as involving "closely analogous facts" (A 1351) to those of the instant case—the LaSalle Hotel in Kansas City maintained a master radio-receiving set which was wired to loudspeakers or headphones in each of the hotel's public and private rooms, over which the hotel's guests, in the words of the court below, "could hear the programs being received on the hotel's master radio." *Ibid.* A local radio station broadcast a copyrighted song without authority from the copyright owner, and the hotel received the broadcast and made it audible through the speaker system. This Court, upon

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[31] The need to focus on the meaning of the statutory term was again demonstrated by this Court in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911). The question there was whether the making of a motion picture based on a book infringed the author's exclusive right to "dramatize" his work, and the Court, in holding that it did, relied almost exclusively on a careful analysis of the meaning of the term "dramatize."

a certified question, held this to constitute an infringing performance of the song by the hotel.

The court below, arguing from *Jewell-LaSalle* and also from the district court decision in *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) (hereinafter cited as *SESAC*),[32] declared: "This, we think, is the nub of *Jewell-LaSalle* and *SESAC*: how much did the defendant do to bring about the viewing and hearing of a copyrighted work?" A 1352. Then, applying its "magnitude of the contribution" test, the court purported to weigh the "contributions" of the hotels in *Jewell-LaSalle* and *SESAC* against that of petitioner's CATV systems here, and announced the conclusion that petitioner's systems had performed the motion pictures because "defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio pro-

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[32] The *SESAC* case, which was not appealed, involved a similar arrangement in the Hotel Pennsylvania in New York. There was a slight technical variation from *Jewell-LaSalle* in that the Hotel Pennsylvania had two master radio sets, each receiving one station, and the guests could switch from one station to the other by turning a knob on the loudspeaker in their rooms. The opinion notes that a witness checked into the hotel and actually heard the song. 19 F. Supp. at 4. The court in *SESAC*, finding a "performance" on the basis of *Jewell-LaSalle*, stated that it regarded "as without significance the differences between the physical arrangements in the LaSalle Hotel and the Hotel Pennsylvania . . . ." *Ibid.* The significant difference between the two cases was that in *SESAC* the broadcast had been authorized by the copyright proprietor, and the district court, deciding an issue expressly left open by this Court in *Jewell-LaSalle*, held that the hotel's acts in receiving the authorized broadcast and playing the song were not protected by any license implied in law. See pp. 72-84 *infra*.

grams for their guests." A 1352-53. (*Cf.* A 1356, where the conclusion is that petitioner's systems did not "far more" but simply "more.")[33]

In interpreting *Jewell-LaSalle* to require a holding of performance in this case, the court below, we submit, misread and misapplied that decision. Far from providing authority for discarding the ordinary-sense meaning of "perform" in favor of a new "magnitude of the contribution" doctrine, *Jewell-LaSalle* was squarely based on the fact that the hotel had provided everything necessary to make the music audible for it guests within its own walls, and had actually made it audible. The question certified to this Court stated the "performance" question as arising from

> "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers *installed in his hotel and under his control* and for the entertainment of his guests, *the hearing* of a copyrighted musical composition which has been broadcast from a radio transmitting station . . . ." 283 U.S. at 195-96 (emphasis added).

The opinion of this Court, by Mr. Justice Brandeis, pointed out that the hotel's acts had included not only

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[33] The court's balancing test, though purportedly based on the "magnitude of the contribution" to the hearing or viewing of the programs, was apparently unaffected by the consideration that the hotels owned, operated, and provided *everything* necessary to make the programs audible for the guests on the hotels' own premises, whereas petitioner's systems only make available the broadcast signal and leave it to the subscribers to purchase, install, and operate on their own premises the receiving set necessary to perform the crucial function of converting the signal into audible and visible programs. See note 11 *supra*.

the reception of the broadcast but also "its translation into audible sound" (*id.* at 200, 201), and that the hotel had produced the music "by instrumentalities under its control" (*id.* at 201).[34] The Court concluded that the acts of the hotel had constituted "essentially a reproduction" (*id.* at 200), which "amounts to a performance" (*id.* at 201), because they had included "the reception of a radio broadcast and its translation into audible sound." *Id.* at 199-200.

Jewell-LaSalle was thus completely consistent with the rule of construction adopted by this Court in the *White-Smith* case. The activities of the hotel which were held to "perform" the music fell squarely within the "ordinary sense" meaning of "perform" because they involved, as the certified question stipulated and the Court repeatedly made clear, the producing of an audible rendition of the work through the hotel's own equipment on the hotel's own premises. Petitioner's CATV systems do no such thing; petitioner provides only the electrical signal, which is transformed into visible and audible programs by the subscribers them-

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[34] Even in the passage from the opinion quoted by the court below, this Court took note that "The transmitted radio waves require a radio receiving set for their detection and translation into audible sound waves," and that the hotel had provided such a receiving set and produced such "audible sound waves." Thus, the Court continued: "The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers"—just as they do "where a hotel engages an orchestra to furnish the music . . . ." In either case, "the music is produced by instrumentalities under its [the hotel's] control." 283 U.S. at 200-01, quoted at A 1351-52.

selves on their own premises through their own receiving sets.[35]

There is one other case on which the district court mistakenly relied for its conclusion on the "performance" issue. A 91. *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can. Exch. 382. The district court failed to note, however, that the "rediffusion" operation provided by the Canadian defendant was crucially different from petitioner's CATV systems, in that the Canadian defendant owned the television sets in the homes of its subscribers; it "lease[d] to the subscribers a loudspeaker and a complete terminal unit 'to give full rediffusion service'." *Id.* at 402. The Canadian defendant thus provided all the equipment, including the television sets, for making the programs audible and visible. The Canadian case is fully consistent with the "ordinary sense" of performance and with this Court's holding in *Jewell-LaSalle*.[36]

There is another reason why *Jewell-LaSalle* does not support the decision below. In *Jewell-LaSalle*,

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[35] "In all of the multiple performance cases prior to *United Artists*, [the instant case] an audible performance took place within a commercial establishment which owned the equipment on which the performance took place. *United Artists* goes well beyond these cases in that it prevents the homeowner from enlisting the aid of another to help him receive a broadcast on his own set for enjoyment in his own home." Note, *CATV and Copyright Liability*, *supra* note 19, at 1520 (footnote omitted) (commenting on the district court decision in the instant case).

[36] The Canadian court held that when the programs were made visible and audible on equipment in the system's showroom, this was a public performance and therefore infringing, but that when the programs were viewed in the homes on the terminal units, these were private performances and not infringing. See discussion pp. 39-42 *infra*.

the radio broadcast received and played by the hotel had not been authorized by the copyright proprietor.[37] The broadcast thus was itself an infringement; the copyright owner had received no payment of any kind in connection with the broadcast or with the hearing of the broadcast music by anyone. Moreover, the hotel made the song available on loudspeakers "throughout the building" (*id.* at 195), so that the "performance" rendered by the hotel was in public. In the present case, by contrast, it is stipulated that the broadcasts of respondent's motion pictures were authorized by respondent, and that the members of the public who received the broadcasts and viewed the programs through subscribing to petitioner's systems were innocent of copyright infringement. See p. 5 *supra*. Hence, the reliance of the court below on *Jewell-LaSalle* was misplaced not only because *Jewell-LaSalle* does not support the doctrine that the test of "performance" is "how much" a defendant did "to bring about the viewing and rendition of plaintiff's copyrighted motion pictures"; but also because the case is not applicable where, as in the present case, both the broadcasting and the viewing were authorized and noninfringing.

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[37] This Court thus had "no occasion to determine . . . the effect upon others of [the broadcaster's] paying a license fee" (283 U.S. at 198), and suggested that "if the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Id.* at 199, n. 5; see pp. 72-84 *infra*.

C. The Sweeping New Doctrine of Infringement By Contribution

To find infringement, the court below proclaimed a new doctrine of "performance." The court's holding was that (A 1349-50):

> "the result brought about by one of defendant's CATV systems—the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers—is fairly characterized as a public performance infringing the copyrights."

Thus, what the court held to be "fairly characterized as a public performance" was not the acts done by petitioner's systems, but the acts done by petitioner's subscribers: their "simultaneous viewing" of the motion pictures in their own homes on their own television sets. But respondent has conceded—a fact ignored by the court of appeals—that the activity of the homeowners in receiving the broadcasts and viewing the programs did not make them liable for copyright infringement.[38] If "the result brought about by one of defendant's CATV systems" is concededly a noninfringing one, it is difficult to understand how petitioner's systems can be held liable for infringement on the

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[38] It was stipulated "that the plaintiff herein does not contend that any of the homeowners who received any of the telecast programs are guilty of copyright infringement." A 817. The court below did not attempt to draw distinctions between petitioner's homeowner subscribers and petitioner's commercial subscribers (*e.g.*, hotels, motels, and taverns), and did not suggest that petitioner infringed because it contributed to public performances which might have been given (although there is no evidence in the record on this subject) by such commercial subscribers. Thus the decision below squarely poses the "result" of holding petitioner liable for infringement because it "contributed" to noninfringing performances in the homes.

ground that they bring about that result.[39] It is also difficult to understand, if the performance consists of the "viewing" of the motion pictures by the subscribers in their homes (as the court expressly states), how this can be considered a public rather than a private performance.[40]

This new "performance" theory should be recognized for what it is: a new doctrine of contributory infringement. Thus, the basis for petitioner's liability is made the "magnitude of its contribution to the viewing of broadcast television programs by its subscribers . . . ." A 1353.[41] The new doctrine differs from the standard doctrine of contributory infringement not only in its vagueness, but in being unencumbered by the usual rule that there can be no contributory in-

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[39] It follows from the decision below, in fact, that the members of the public who subscribe to petitioner's systems—and the millions throughout the country who subscribe to other CATV systems—will be liable for contributory infringement, inasmuch as through their subscription contracts they request, contract for, and induce the activity of the system. Respondent is well aware of this, having asserted in its brief in the court of appeals that "defendant's subscribers, who . . . enjoy the reproduction and performance of the television programs 'in the privacy of [their] home,' participate both realistically and in contemplation of law, in a *public* performance." Brief for Plaintiff-Appellee at 40-41 (emphasis in original). See also note 75 *infra*.

[40] See *Canadian Admiral Corp.* v. *Rediffusion, Inc.* [1954] Canadian Exch. 382, 404-409; pp. 41-42 *infra*.

[41] The "nub" of the question, as viewed by the court below, is "how much did the defendant do to bring about the viewing and hearing of a copyrighted work?" A 1352. Questions to be asked by the court applying the doctrine in a given case are whether the defendant "did far more," or "so much," or simply "more" (A 1352, 1354, 1356) than another defendant in another case might have done to "bring about the viewing and audition of plaintiff's copyrighted motion pictures." A 1356.

fringement unless there is a direct infringement to be contributed to. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961). Thus, even though the reception of the broadcast signal by the subscriber, its translation into the sights and sounds of motion pictures by the subscriber's television set, and the viewing of the motion picture by the subscriber are conceded to be noninfringing—as also is the broadcasting of the programs by the broadcasting station—the CATV system is held liable for infringement because of "the magnitude of its contribution" to this "result."

The court's reasoning assumes *sub silentio* that sight and sound are essential ingredients of a performance, and the court found the sight and sound in the "viewing" by subscribers. But this viewing is at most a private performance, and the "result" to which petitioner was contributing thus could not be more than a private performance.[42] Somehow the court had to find a way to convert this viewing into a public performance by petitioner. The fact that there was more than one such private viewing cannot support any conclusion other than that there was more than one private performance; multiplicity of private performances is not of itself a public performance.[43] Such was the holding of the Exchequer Court of Canada in *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can.

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[42] As stated by the Court in *Jewell-LaSalle* (283 U.S. at 196):

"The parties agree that the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. For even if this be deemed a performance, it is neither public nor for profit."

[43] See *Nimmer on Copyright* § 107.42 at 412 (1967).

Exch. 382, 404-409 (see discussion p. 37 *supra*), where the court stated: "I cannot see that even a large number of private performances, solely because of their numbers, can become public performances. The character of the individual audiences remains exactly the same; each is private and domestic, and therefore, not 'in public'." *Id.* at 408. The court below bridged the gap between the private viewing by the subscribers and a public performance by petitioner through judicial fiat and resort to the asserted analogy of a broadcasting station (A 1355-56):

> [I]t is settled that a broadcast or other transmission of a work to the public or a cross-section of it results in a public performance although each individual who chooses to enjoy it does so in private. . . . In any event, it seems clear to us that when one of defendant's CATV systems enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones."

The critical point in the court's reasoning is the proposition that by "enabling" many subscribers to operate their own television sets and view the program, petitioner's CATV system is "engaging" in "one public performance." The court does not suggest why it is only "one" public performance, or how many private persons viewing the program are necessary before one public performance could be found. Nor does the court suggest that the CATV system performed the copyrighted work by receiving and transmitting the broadcast electromagnetic waves, and that that performance was then made public by virtue of the fact that the electromagnetic waves were conducted to the homes of many subscribers. The proposition is simply that

"enabling" private viewing becomes without more the equivalent of "engaging" in a "public performance." Such judicial fiat was used by the court of appeals, we submit, to work an unwarranted distortion and expansion of the performance monopoly.

D. The Erroneous Analogy to Broadcasting

The court below attempted to support its new doctrine of performance by analogizing a CATV system to a broadcasting station; it argued that petitioner's CATV systems must have "performed" the motion pictures because broadcasting stations are held to perform copyrighted material embodied in the programs they broadcast. Thus the court stated (A 1354):

> "Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in[44] a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constitutes a public performance."

For this proposition the court cited *Jerome H. Remick & Co.*, v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925). *Remick* does not support the court's reasoning for it involved a performance by an orchestra in the station's studio which was held to be made "public" by the broadcast. See p. 45 *infra*. Recognizing this shortcoming, the court below then argued that the "performance" by the broadcaster cannot take place in the

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[44] The question under the Copyright Act to be decided in this case, we submit, is not whether the operation of petitioner's systems "resulted in" a public performance, but whether it *was* a public performance.

broadcasting studio—as the cases in fact hold[45]—because the visible or audible rendition of the copyrighted work that typically takes place in the studio may be dispensed with in the case of "the broadcast of taped and relayed programs or, usually, of motion pictures." A 1354. The court next resorted to its conception of "the policies of the Copyright Act," arguing that in any event a broadcast of a copyrighted work "harms the copyright holder not because . . . a handful or a roomful of persons sees the work performed at the studio but because thousands of viewers watch it in their homes." A 1355.[46]

Finally, the court was faced with the ultimate facts that broadcasting has a unique status under the Copyright Act and the Federal Communications Act—for example, the broadcaster has a duty under the Communications Act to select and originate programs, and public performance "by broadcast" is expressly recognized by the Copyright Act (see pp. 49-50 *infra*)—and that a CATV system is in no respect a broadcaster.[47] The court's response at this point was to drop the broadcaster analogy and switch back to its basic reliance on *Jewell-LaSalle*: "But the Supreme Court

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[45] See pp. 45-46 and n. 49 *infra*.

[46] The views expressed and applied by the court below as to "the policies of the Copyright Act" are discussed at pp. 58-62, *infra*. Suffice it to note here that what "harms the copyright holder" is not the test of what is infringement under the Act. See *White-Smith Music Publishing Co.*, 209 U.S. 1, 18 (1908), quoted at p. 29 *supra*.

[47] *Report and Order on Impact of CATV Systems and Auxiliary Television Services*, Docket No. 12,443, 26 F.C.C. 403, 18 Pike & Fischer R.R. 1573, ¶¶ 65-67 (1959); *Cable Vision, Inc.* v. *KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho 1962), *rev'd on other grounds*, 335 F. 2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them." A 1355.

The theory that CATV systems "perform" because broadcasting stations do is no more tenable than the theory that they "perform" because the hotel did in *Jewell-LaSalle*. The answer to the broadcasting theory, and also to respondent's transmission theory (see pp. 55-58 *infra*), begins with the original and archetypal broadcast, which involves a "live" rendition of the work arranged by the broadcaster in his studio. In such a case, what takes place in the studio is audible and visible and clearly a "performance" within the meaning of the Act. This was the situation in the leading *Remick* case, *supra* page 43, cited by the court below. The copyrighted music there had been played "live" by an orchestra in the broadcaster's studio, and the question considered by the court, and decided in the affirmative, was not whether the broadcaster had performed the music—he obviously had—but whether the broadcast had made the performance "public."

Other cases dealing with the "public performance" liability of broadcasters consistently confirm this interpretation that the work is "performed" in the studio and that the broadcast—the broadcaster's dissemination into the air, for reception by the public, of the broadcast waves into which he has converted the sights and sounds of the work—constitutes the means by which that performance is made "public." For example, in the leading English *Messager* case,[48] heavily relied upon by respondent for its "transmission"

[48] *Messager* v. *British Broadcasting Co.*, [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151.

theory (Respondent's Brief in Opposition to the Petition at 17-18), the trial court held that

> "the actual performance of 'The Little Michus' was given in the defendants' private studio on Savoy Hill, London, by the orchestra and performers engaged by the defendants . . . . Officials and a few friends only were present apart from those who rendered the opera." [1927] 2 K.B. at 548

It then noted that the defendants "set in motion certain ether waves," and held that the effect of the defendants' emission of "ether waves" to the public was "to render audible to that public the performance given within the walls of the defendants' studio" (*ibid*)—in other words, to make the private performance in the studio "public." The court thus concluded that "the defendants, in doing what they did, clearly gave a public performance." *Ibid.*[49]

Imposition of "public performance" liability on the broadcaster was supported, of course, by the consideration that the radio or television broadcast served as a substitute for the "live" performance of the work in a concert hall or theater which the members of the public receiving the broadcast might otherwise have at-

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[49] The holding in *Chappell & Co.* v. *Associated Radio Co. of Australia,* [1925] Vict. L.R. 350, was the same as in *Messager.* The defendant there had caused a live performance in its studio. *Id.* at 351, 352, 358. The distinction between the "performance" and the "transmission" is made perfectly clear by the terms of the court's decree, which enjoined the defendant from causing the plaintiff's musical works "to be sung or performed for wireless transmission to the public." *Id.* at 362. Both *Messager* and *Chappell* cite and rely on the leading U.S. case, *Jerome H. Remick & Co.* v. *American Automobile Accessories Co., supra* page 43. See also *Jerome H. Remick & Co.* v. *General Electric Co.,* 16 F. 2d 829 (S.D.N.Y. 1926), cited by the court below at A 1354.

tended, and for which the copyright owner would have received a "performance" royalty as intended by Congress.[50]

Once the broadcaster's liability for a "public performance" was recognized in the case of "live" broadcasts, it followed naturally that the same result should be reached in cases where the broadcaster dispenses with the live performance in his studio and substitutes the playing of a record, tape, or motion-picture film, or a program supplied to him (usually through telephone lines or microwave transmission) by a network. Although the technical methods have changed, all relevant considerations support the same legal result. Even under the specific language of the Copyright Act, there is no reason to doubt that the broadcaster is still "performing" the program material in his studio and making the performance "public" by the broadcast. The Act expressly recognizes that the playing of a record, film, or tape in which the copyrighted work is recorded constitutes a "performance" of the work.[51]

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[50] See the discussion in note 29 *supra* of the legislative history of sections 1(c) and 1(d).

[51] Section 1(d) confers, with respect to a dramatic work, the exclusive right to make a "transcription or record thereof" from which it may be "performed."

Technologically, the station's playing of the film, tape, or record constitutes a processing of the content of the program, and conversion of that content into electrical energy, fundamentally equivalent to the process performed by the station's cameras and microphones with respect to a "live" performance. Thus, the district court found that: "When the tape is run under the readout head of a tape playback unit in the television broadcasting station, the unit acts in much the same way as the television camera and microphone in the case of a live performance," and that in the case of motion picture film, the images are projected within a camera tube in the broadcasting studio and "then scanned by an electronic beam in the same manner as does the television camera in conjunction with a live scene." A 43.

Whatever technical methods are employed, the essential fact remains that, as the F.C.C. has emphasized, "Programming is the essence of broadcasting."[52] Whether the broadcast is "live" or from tape or film or a program supplied by a network, the broadcaster is selecting and procuring the programs that he broadcasts to the public—functions for which he, and he alone, is legally responsible under the Communications Act. Broadcasters "must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations, whether such matter is produced by them or provided by networks or others."[53] This duty of the broadcaster is "personal" under the Federal Communications Act and "may not be delegated."[54]

When a broadcaster decides to obtain his program material from tape or film or a network, he is substituting this program source for the live performance that he would otherwise have staged in his studio. The live

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[52] F.C.C. Form 301 (Application for a Construction Permit) (Ex. D2, E 367, R 1679). The form also quotes the *Report and Statement of Policy, Network Programming Inquiry*, 25 Fed. Reg. 7291, 20 Pike & Fischer R.R. 1901 (1960). Detailed information as to the program sources of a broadcasting station is required in the application.

[53] E. 367. Under the regulations of the F.C.C., a licensed broadcasting station is required to maintain a studio for originating programs (47 C.F.R. § 73.613 (1967)), and to identify itself (by call letters) as the originator of the programs that it broadcasts. 47 C.F.R. § 73.652 (1967).

[54] E 367. A network is not licensed as such to broadcast under the Communications Act. It provides program material by contract to its affiliated stations, which those stations then decide whether or not to broadcast; but the programs selected by the affiliated station are then broadcast—not "rebroadcast"—by the licensed station itself.

performance which was put on the film or tape was indeed recorded with the objective that it be used by the broadcaster as a program source. There is no reasonable basis for concluding that such a substituted program source should relieve the broadcaster of "public performance" liability under the Copyright Act. *Cf. Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 201 (1931). And so far as the copyright owner is concerned, the station's broadcast of the work, whatever the technical means employed in the studio, is the basis for compensating him for the public's reception of the broadcast work.

The rule that a broadcast constitutes a performance in public is expressly confirmed by the Copyright Act. The Act was amended in 1952 to extend the performance right under § 1(c) to nondramatic works and at the same time to impose a maximum recovery limit of $100 for innocent infringement of that subsection "by broadcast." Act of July 17, 1952, ch. 923, § 1, 66 Stat. 752.[55] There is no reason to suppose that it makes any difference under this provision whether the broad-

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[55] This amendment was enacted, as found by the court below, "at a time when the first CATV systems were already operating." A 1350. The first system was established in 1948, and by 1952 there were more than 100 serving well over 100,000 subscribers. M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* 50 (G.P.O. 1965).

In view of this provision of the Act, the liability imposed on CATV systems by the court below is truly "anomalous. Whereas a broadcasting station which innocently broadcast a copyrighted nondramatic work without authority from the copyright owner could only be held liable for $100, a CATV system which in equal innocence received and transmitted to its subscribers the same broadcast from the same station would have no such limit on its liability.

caster stages a live performance in his studio, broadcasts from a record or tape or film,[56] or broadcasts a program which he has contracted to have supplied to him by a network.[57]

Of the various characteristics peculiar and essential to the broadcast function that produce the broadcaster's "public performance" liability, not one is applicable to petitioner's CATV systems. They are in no respect engaged in "broadcasting."[58] They do not select, procure, or originate programs; they are in no respect responsible for programs. They sell no advertising as the broadcaster does. They do not convert the sights and sounds of programs—whether in the form of a live performance or of information stored on records, tape, film or from a network—into electromagnetic waves for transmission through the air to the public. They do not deal in this or any other respect with the content of programs, but only with electromagnetic waves. Even as to those waves, petitioner's systems do not radiate them out into the air for reception by the public at large, but receive them after they have been so disseminated and transmit them through wires to the particular premises of members of the public who

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[56] See *Associated Music Publishers* v. *Debs Memorial Radio Fund*, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir., 1944), *cert. denied*, 323 U.S. 766 (1944).

[57] The only case holding a broadcasting station liable in the network type of situation is *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943). See also *Law* v. *National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943) (suit against network); *Davis* v. *E. I. du Pont de Nemours & Co.*, 249 F. Supp. 329 (S.D.N.Y. 1966).

[58] See authorities cited note 47 *supra*.

have elected to use this service.[59] Petitioner's systems do not produce, and never have produced, "live" performances in studios (they do not have studios) which are then made public through the broadcasting process; the technical operations of the systems are thus in no sense a substitute for a live performance. And finally, the hearing and viewing of the telecast programs by petitioner's subscribers in their own homes is not an enjoyment of the copyrighted work for which the copyright owner will receive no payment unless he can collect from petitioner, for the copyright owner has already been paid for that very broadcast by the broadcasting station.

The contrast between the intimate and necessary involvement of the broadcaster in the procurement and origination of programs, and the absence of any such relationship between petitioner's CATV systems and the programs, underlines the difference between a broadcaster and a CATV system. The broadcaster, in the words of the F.C.C., is legally and personally responsible for planning, selecting and supervising programs for broadcast. He deals with program sources: networks, movie owners such as respondent, and live performers. He knows who they are; negotiates the fee for the license to broadcast, schedules the program for broadcast and sells advertising to be broadcast as commercials. The CATV system has no involvement with programming; its charges are for the antenna service and unrelated to programs. Moreover, the

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[59] The Communications Act makes a clear distinction between "broadcasting" and "radio communications" on one hand (47 U.S.C. § 153(o), (b)) and "wire communications" on the other (47 U.S.C. § 153(a)).

CATV system has no way to identify the person or persons who own the copyright on the program material; it does not know for certain what programs will be broadcast. And even if the copyright owner could be identified, there is no way in which he could be located. If he could be located, the negotiations would normally be after the broadcast, when there is no basis for negotiation but only for payment of amounts demanded or for litigation as to damages.

In sum, contrary to the court below, it would be anything but "anomalous" to hold that petitioner's systems do not perform copyrighted works in public although broadcasting stations do. It would simply be a recognition that broadcasting stations have unique functions and attributes which account for their public-performance liability, and that petitioner's CATV systems share none of those characteristics. The attempt of the court below to establish "infringement by analogy" by comparing petitioner's CATV systems to broadcasting stations is no more successful—and no more permissible an interpretation of the "public performance" right—than its attempt to compare them to the hotel in *Jewell-LaSalle*.

E. The Sweeping Consequences of the New Theory of Contributory Performance

One may well wonder how the court of appeals' new doctrine of contributory performance, if allowed to stand, would be applied to other cases. There is no doubt that it contains a great potential for further expansion of the performance monopoly over radio and television reception and other current and future methods of communicating information by electronic means. Since "the technical means by which the result

is produced are irrelevant to this issue" (A 1357 n. 9),[60] there will be an infringing performance whenever "simultaneous viewing" by "as many as several thousand" (A 1350)—or "several hundred" (A 1356)—members of the public is a "result produced" (A 1357 n. 9) by a defendant's challenged activity, depending on "the magnitude of its contribution" (A 1353) to the viewing of the programs.

The fact is that a great variety of persons and services "contribute" to the "result" of the "simultaneous viewing" of television programs by members of the public. Among these are the manufacturers and distributors of television sets and television antennas; the common carriers that provide the communications lines between network facilities and affiliated stations; and the public utilities that provide the electric power which operates the public's television sets. All these services are indispensable to the viewing of television programs by the public, and any of them might be deemed, under the amorphous doctrine of "performance" conceived by the court below, to "contribute" "as much" or "more" to the public's "simultaneous viewing" than was contributed by petitioner's CATV system in this case.

One particularly important type of aid to television reception, in addition to CATV itself, will be branded as infringement if the decision below is al-

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[60] The court of appeals made it perfectly clear that its decision was not based in any way on the equipment utilized. It stated that its "decision would be unchanged if defendant's system had made no use of amplifiers." A 1357 n. 9. Respondent has revived a technological argument rejected by the court below in contending that the performance by the CATV is in the "transmission" of electromagnetic energy. See pp. 55-58 *infra*.

lowed to stand. These are the "master antennas" that are commonly used by apartment houses and other buildings in urban areas to aid television reception by the tenants.[61] The equipment and functions of such master antenna systems are essentially identical to those of petitioner's CATV systems,[62] and there is no reason to doubt that, under the doctrine of the court below, the "magnitude of the contribution" made by such systems to the "simultaneous viewing" of television programs by the tenants connected to the system (who may number, of course, into the thousands) is as great as that of petitioner's systems here. On the basis of the decision below a court would have to conclude that the apartment-house landlord operating such a master antenna was guilty of copyright infringement—with the result, generally, of bringing about a rent increase for the tenants in order to pay for the landlord's copyright royalties.[63] Infringement liability

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[61] A relatively recent estimate was that in New York City "about 750,000 dwelling units received TV from master antennas." Broadcasting Magazine, Dec. 5, 1966, at 9.

[62] See petitioner's offer of proof as to the comparability of the equipment. A 902-04. See the testimony of respondent's expert witness that the function is the same. A 641-42.

[63] The caveat of the court below that it was not deciding a case where "a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas" (A 1366) would not exempt master antenna systems in large cities. Apart from the onerous burden of proof that would be placed on a master-antenna defendant to show what stations the various tenants could or could not receive satisfactorily with "normal antennas", it is well known that obstruction from tall buildings in such cities often prevent satisfactory reception of local television stations, especially for residents of lower-floor apartments. See pp. 88-89 *infra*.

would also be imposed on the many cooperative antennas.[64]

The "contributive" theory of a performance expressed in the opinion of the court below is a novel one with many possibilities for judicial extensions of the copyright monopoly. Petitioner submits that extensions of a limited statutory monopoly should be left to Congress, and that the present Copyright Act should be construed in accordance with principles established by this Court in *White-Smith.*

II.

THE MERE TRANSMISSION OF ELECTROMAGNETIC ENERGY DOES NOT CONSTITUTE A "PERFORMANCE."

Apparently recognizing the untenable nature of the rationale for "performance" adopted by the court below, respondent has abandoned the court's contributory theory of performance, and argues for a theory that would find a "performance" by petitioner's CATV systems independent of the "viewing" by the subscribers.[65] Respondent's theory is that the CATV systems are liable because they receive and "transmit" or "retransmit" the broadcast signals. "Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance . . .," respondent states,[66] and it is irrelevant whether sight and sound are produced by the CATV system or whether any subscriber views the motion picture. Transmission of

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[64] It should be noted that section 1(d) of the Act contains no requirement that the public performance of a dramatic work be for profit, so that the profit aspect of petitioner's business is irrelevant to the court's holding of infringement under that section.

[65] Respondent's Brief in Opposition to the Petition at 25.

[66] *Id.* at 12. See also *id.* at 13, 18, 21, 22, 23, 25.

electromagnetic energy, in and of itself, is made, in respondent's argument, the equivalent of "performance," as if the word "transmission" had been used in the statute, and despite the fact that respondent cannot and does not claim any copyright in the electromagnetic energy which is transmitted. Respondent, too, turns to the broadcast station's copyright liability for an analogy, but the cases supply no more support for respondent's "transmission" theory than for the rationale of the court below.

Respondent's transmission theory is a variant of the technological argument respondent made in the courts below. Although the district court accepted such a theory,[67] the court of appeals rejected the ap-

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[67] The district court found a "performance" in the electronic operation of petitioner's CATV equipment, its primary theory being that electronic "reproduction" of the carrier wave was accomplished by each tube in each amplifier. See pp. 16-17 and note 20 *supra*. Under this theory there would be infringing "reproductions" of the copyrighted work by every tube in every radio or television set (a television set has 20 to 30 tubes), as well as in every master antenna system, every individual antenna installation using amplifiers, in the thousands of amplifiers used by the telephone company and other common carriers, and in the innumerable other electronic appliances and devices that use amplifiers tubes, or transistors.

An alternative technological theory of performance embraced by the district court related to "modulation" of carrier waves, a process which took place in one piece of equipment used by petitioner at one time and which the court found "electronically the same" as modulation by a broadcaster. A 57. However, as the record shows and as the court of appeals noted (A 1348-49), only one piece of equipment used by petitioner at one time "modulated" carrier waves, and then only for the visual carrier and not for the sound waves. A 532. Modulation is not necessarily performed by CATV equipment. See A 47, 209-10, 530-31, 734-35. Indeed, it was a weakness resulting in distortion of the signal. A 896.

proach, concluding that "the result produced by defendant's systems constitutes a public performance, and that the technical means by which the result is produced are irrelevant to this issue." A 1357. Respondent now revives a technological argument based on transmission.

Transmission is the process of transferring an electric signal from one location to another. Electromagnetic waves are "transmitted" by every cable or wire running from every receiving antenna to a television set or a radio set. They are also transmitted, albeit for only a short distance, within each television set itself. A 554. The *Remick* case and the *Messager* case, pp. 45-46 *supra,* make it clear that performance is separate from transmission. Transmission may have copyright significance but only if the person "transmitting," for example, a broadcaster, has first made a performance and then by the transmission makes that performance public.

Respondent's theory of performance based on transmission of electromagnetic energy encompasses not only every television set and radio set but every apartment-house master-antenna system and every communications common carrier. Communications common carriers, such as the American Telephone and Telegraph Company, provide transmission service both intracity and intercity to television networks and stations. In addition, there are now being developed, as the district court noted (A 103), many new devices to transmit sounds, pictures, documents and data through electronic transmission—all of which would bring the "transmitter" within respondent's doctrine of "performance." It is difficult to believe that the "ordinary sense" or "common understanding" of

"performance" in the Copyright Act encompasses such a sweeping expansion of the monopoly.

The notion of "conjuring with transmission" has recently been discussed by Professor Benjamin Kaplan in comments which, although made in the context of proposed new legislation, are also pertinent here:

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications. . . . Instead of conjuring with 'transmission,' we have to consider whether clamping down copyright controls would have any hurtful anticompetitive effects, or would be consistent with the declared purposes of the Federal Communications Act, or would serve as a desirable means of correcting the hardships which CATV systems may visit on TV stations in the same localities." *B. Kaplan, An Unhurried View of Copyright,* 105-06 (1967) (printed earlier in 66 *Colum. L. Rev.* 831, 844 (1966)).

III.

THE DECISION BELOW EXTENDING THE "PUBLIC PERFORMANCE" MONOPOLY TO CATV OFFENDS THE PRIMARY POLICY OF THE COPYRIGHT ACT, DISREGARDS THE ANTICOMPETITIVE CONSEQUENCES THAT WOULD FLOW FROM ITS RESULT, AND PUTS THE COPYRIGHT ACT INTO CONFLICT WITH THE POLICY OF THE FEDERAL COMMUNICATIONS ACT AND THE REGULATORY SCHEME ESTABLISHED UNDER THAT ACT BY THE F.C.C.

A. The Primary Policy of the Copyright Act

The Court below justified its conclusion on the performance issue in terms of "the policies of the Copyright Act." A 1349. In fact the court invoked only a single Copyright Act policy: that of rewarding the copyright proprietor. The "policies" of the Act boiled down, in the court's view, to the question of whether

a challenged activity "harms the copyright holder." A 1355. The only "fundamental purpose of the exclusive right of public performance" that the court recognized was "to protect copyright proprietors against dilution of the market for their works." A 1353.[68]

Yet this Court has made clear that rewarding the copyright proprietor is not the exclusive or even the primary policy of the Copyright Act. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954).[69] The primary consideration is to make available to the public the benefits of authors' works—"to induce release to the public of the products of [the author's] creative genius." *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 158 (1948).[70]

This primary policy of the Copyright Act, embodied in the limits placed on the exclusive rights granted to the copyright proprietor, is in accord with the general policy in our law against according private economic monopolies in the absence of overriding countervailing considerations. It means, at the very least, that in a particular case where a court must decide whether

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[68] The district court likewise justified its result as one that "effectuates the predominant purpose and policy" of the Copyright Act (A 94) and recognized no purpose or policy other than that of "protecting the copyright proprietor's performance monopoly.". A 72.

[69] *Accord, United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *United States* v. *Loew's, Inc.*, 371 U.S. 38, 46 (1962).

[70] See *Fox Film Corp.* v. *Doyal*, 268 U.S. 123, 127 (1932); *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 967 (1967); *cf. Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964).

specified activity falls within the statutory monopoly, the "policies" of the Copyright Act do not invariably favor extending the monopoly in order to increase the reward to the copyright owner, and the consequences of an extension should be carefully weighed where the activity in question is not clearly within the Congressional intent. The limited monopoly granted by Congress should not be construed so as to offend its primary policy or to create anticompetitive consequences not specifically contemplated by Congress.

Policy considerations should be decisive on a novel question of interpreting the "performance" monopoly, where even the courts below recognizd there is nothing in the language or legislative history of the Act, or in the case law, directing a conclusion of infringement. Yet the court below, while purporting to consider the "policies" of the Act, considered only the secondary policy and not the primary one.[71]

The Act's primary policy is offended, petitioner submits, by the court's conclusion that petitioner's systems "publicly perform" respondent's motion pictures. Under that policy, the controlling consideration is the fact that the motion pictures were licensed by respondent to the broadcasting stations for broadcast for reception by the public.[72] If respondent wishes to exploit

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[71] The court expressly declined to consider the primary policy as relevant to the performance issue (A 1360 n. 10), and with respect to the license issue dismissed the policy on the ground that "it involves purely legislative considerations." A 1363.

[72] The court below recognized that the copyright owner had released the work for broadcast to the public but apparently concluded that the public did not include those who decided to use petitioner's services to assist their reception. Thus the court stated that "a different case might be presented" if petitioner's subscribers could receive the broadcasts with a "normal antenna." A 1366. See discussion pp. 84-90 *infra*.

its copyright through broadcasting, it must subject its copyrights to broadcasting's physical and legal structure.[73] As a matter of law under the Communications Act, broadcasting stations, which are granted a license to use a portion of the public's frequency spectrum, broadcast their signals intending them to be received by the public.[74] Respondent received a reward satisfactory to it for permitting each broadcast of the motion pictures by the broadcasting station to the public. Indeed, because of the economic structure of the television industry, the royalty extracted by respondent from the broadcasting station took into account the presence of petitioner's CATV subscribers within the station's audience. See pp. 90-94 *infra.*

Thus, by virtue of the license granted by respondent to the station, the objective of rewarding the copyright owner sufficiently "to induce release to the public of the products of [the author's] creative genius" (*United States* v. *Paramount Pictures, Inc., supra,* 334 U.S. at 131, 158 (1948)) was satisfied. So far as each particular licensed broadcast is concerned, the Act's primary policy of making available to the public the benefits of the author's work should then be controlling. And that policy would be offended by allowing the copyright owner to restrict the reception of the broadcast off the air by the public in order to obtain

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[73] See *Buck* v. *Debaum,* 40 F. 2d 734, 736 (S.D. Calif. 1929), quoted at note 86 *infra.*

[74] 47 U.S.C. § 153(o) defines "broadcasting" as "dissemination of radio communications intended to be received by the public. . . ."

a second reward for that reception.[75] The primary policy of the Copyright Act thus argues clearly and strongly against an interpretation holding the operations of a CATV system such as petitioner's to constitute an infringing "public performance."[76]

B. Anticompetitive Consequences

Where CATV is concerned, the policy against unnecessarily extending the economic monopoly of the copyright owner is reinforced by a special consideration. This is the real danger that imposition of copyright liability on CATV systems, as through the decision below, would have harmful anticompetitive consequences. The Department of Justice has expressed the view that competition would be harmed in at least three significant respects:[77]

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[75] It is respondent's position, as expressed in its brief in the court of appeals that "it makes no difference how much the copyright owner collects, whether once, or twice, whether much or little, so long as it is acceptable to him." Brief for Plaintiff-Appellee at 93.

Respondent in fact would not be content with a second royalty for a single broadcast, but has said that it will seek at least a third. In its brief in the court of appeals respondent expressly reserved an infringement claim against "defendant's commercial subscribers" who maintain television sets open to the view of the public in such establishments as hotels, restaurants, bars, and stores. *Id.* at 68 n. 73. In addition, even petitioner's homeowning subscribers could be liable for contributory infringement under the decision below. See note 39 *supra*.

[76] If a case arose in which the broadcast were not authorized, the copyright owner could of course recover from the broadcasting station.

[77] *Hearings Pursuant to S. Res. 201 on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyright of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. at 212-213 (1966). A Senate Subcommittee in August, 1966, had before it a provision in a copyright-revision bill which would have accomplished the same

"First, the nature and composition of the CATV industry may be transformed . . . . Ownership and control of copyrights is highly concentrated in the networks, movie studios and other television producers. . . .

. . . .

"Given the power to subject CATV systems to copyright liability, the networks or the other large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves. . . . Moreover, were the copyright owners to achieve control of a substantial portion of the CATV business, they could impede entry of other independent operators into the field by refusing to allow such potential competitors to carry their programs. . . .

"A second possible anticompetitive development could arise if Congress or the Federal Communications Commission should decide to allow CATV systems to originate their own programs. CATV then could compete with existing networks, providing an additional market for program producers and an important channel for reaching the viewing public apart from the existing major networks. Assuming the potential development of such competition, it would be clearly undesirable to allow networks to use their ownership or control of pro-

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result as the decision below in this case—the result of subjecting CATV to copyright-infringmeent liability. In a statement delivered by the Acting Assistant Attorney General in Charge of the Antitrust Division, the Justice Department opposed the provision on the basis of its belief "that this explicit and blanket extension of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences and that this extension is not justified by valid considerations of the right to copyright protection." The Department said it had "reached these conclusions after considering the probable effect of the proposal upon competition and upon broadcasting regulation, and the extent to which it furthers interest protected by the copyright law." *Id.* at 211-212.

gram copyrights to extend their power into ownership of CATV facilities, or to limit the independence of CATV operators. . . .

"Finally, CATV systems run a second communications cable into each house that they serve. This cable may in the future also provide access to many new electronic service industries. If . . . a few large copyright holders directly or indirectly control this second wire, it may discourage the development of competition in these prospective industries."

In addition to the possible "harmful anticompetitive consequences" pointed out by the Department of Justice, there is another anticompetitive aspect of the result reached by the court below. If allowed to stand, the decision will empower the networks and the few other companies that control most television copyrights to solidify, elaborate, and perpetuate their present system of exclusive territorial licensing of television markets. It is clear that this is the major copyright holders' primary objective in this case and related litigation.[78] And the court of appeals, in imposing on CATV the liability that the copyright holders seek, has given its express blessing to territorial restrictions on off-the-air reception, stating that "in an age of motion pictures and radio and television broadcasting, it would

[78] The Columbia Broadcasting System, for example, upon filing its suit against a CATV company, now pending before the same District Judge that decided this case and awaiting disposition of this case by this Court (see *Columbia Broadcasting System, Inc.* v. *TelePrompTer Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965)), issued a press release saying it did not seek the copyright power over CATV as a source of income but as a means of preserving "the present system of nation-wide program distribution by television networks through their affiliated stations." CBS Press Release, Dec. 11, 1964.

seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences . . . ." A 1362. The decision below thus clears the way for the copyright holder in licensing his programs to draw exclusive territorial lines around broadcasting stations—forbidding off-the-air reception by CATV, master antennas, or cooperative antenna systems—whenever, wherever, and however the result would be, in his judgment, to increase his total reward. Such a power would be inconsistent not only with the policies of the antitrust laws (*cf. United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)), but also with the authority given the F.C.C. under the Communications Act "to establish areas or zones to be served by any station." 47 U.S.C. § 303(h) (1954).[79]

The anticompetitive implications of the decision below are cast into sharp relief when it is realized that the CATV systems would have no bargaining power in attempting to negotiate copyright licenses and would be at the mercy of the copyright owners. As a practical matter, they would normally be unable to negotiate at

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[79] See Note, *CATV and Copyright Liability*, *supra* note 19, at 1526-28. The prospect of territorial restrictions inconsistent with the public interest under the antitrust laws or the Communications Act is not speculative; nor is it limited to the prescribed service areas of the broadcasting stations as presently regulated by the F.C.C. In the present case, respondent in its licensing contracts with the broadcasting stations has purported to limit their right to broadcast the licensed motion pictures to the Grade A contours of the stations. Ex. O, Clause Twenty-Fifth, E 343, A 1296. Moreover, respondent has asserted in its form license contract the right to prevent the public from utilizing the service of a CATV system, even when located in the same community as the television station, to receive the broadcast. *Id.*, Clause Second and Twenty-Fourth, E 340, 343.

all in advance of the broadcast (and hence the infringement). A CATV system has no control over what is to be broadcast and, since announced programs are frequently changed by the station, no reliable advance knowledge either.[80] Even if some machinery could be privately created for advance notification and identification of the copyright owner, the CATV system would have no basis for bargaining with him. Unlike the broadcasters who may choose between and bargain in advance with several alternative program suppliers, the CATV system's only alternative to paying whatever the copyright owner demanded (assuming the copyright owner was willing to consider granting a license) would be to turn off reception of the broadcast in question (a course of action which would not long be tolerated by the system's subscribers). After the broadcast, if it was received, there would of course be no choice for the system but to pay or litigate the damages. It is quite unlikely that CATV with its presently diverse ownership could continue to exist under such a regime; the foreseeable result is that the systems would be taken over by the copyright owners.

The court below took no note of the danger that a decision imposing copyright liability on CATV would have these "harmful anticompetitive consequences." Petitioner submits that in a case like the present one, presenting an issue of first impression as to the scope of a statutory monopoly, a court not only can but should take account of authoritative indications that a deci-

[80] The problems of advance clearances for CATV were described by the Deputy Register of Copyrights, in connection with copyright revision legislation, as "a real problem that cannot be brushed under the rug." *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 1, at 36 (1965).

sion extending the monopoly would have harmful anti-competitive consequences. *Cf. International News Service* v. *Associated Press,* 248 U.S. 215, 262-267 (1918) (Brandeis, J., dissenting); *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U.S. 488 (1942). To do so is not to intrude on the legislative realm, but simply to recognize the heightened impact, in the circumstances, of the judicially cognizable policy which disfavors economic monopolies and hence favors strict judicial construction of the exclusive rights of the copyright proprietor. *Cf. Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225, 228-30 (1964).

C. The Conflict With the Policy and Regulatory Scheme of the Communications Act

The Court in granting certiorari in this case set it down for argument with *United States* v. *Southwestern Cable Co.,* No. 363. The issue in that case is whether the F.C.C.'s rules regulating non-microwave CATV are valid. If this Court affirms the decision of the Ninth Circuit that the F.C.C. had no authority to issue the rules, there could be no direct and present conflict between those rules and the Copyright Act as construed by the court below, although the court's decision would still conflict with the policy of the Communications Act (see pp. 79-84 *infra*) and with valid regulations that the Congress might subsequently authorize the F.C.C. to issue in pursuance of that policy. If the Court holds the F.C.C. rules valid, however, there arises a direct and substantial conflict between the existing regulatory scheme for CATV under the Communications Act and the Copyright Act as construed by the court below.

That an Act of Congress should be judicially construed, where possible, to harmonize rather than con-

flict with other Acts of Congress applicable to the same subject matter hardly requires argument. See *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 806 (1945); *United States* v. *Hutcheson,* 312 U.S. 219, 231-32 (1941). The construction of the Copyright Act by the court below indeed puts that statute in conflict with the policy of the Communications Act favoring free public reception of licensed broadcasts. See pp. 79-82 *infra.* The principle of construing a statute to avoid such conflicts if possible has special force, however, when a proposed novel application of one statute would interfere with a comprehensive regulatory scheme established under another statute and applicable to the same aspects of the same activity. Thus in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), this Court interpreted the Sherman Act not to apply to the practices charged because, under the Civil Aeronautics Act of 1938, they were subject to the regulatory jurisdiction of the C.A.B.[81]

The principle is preeminently applicable to the present case. The F.C.C., after initially declining jurisdiction over CATV, has issued and put into effect a comprehensive and detailed regulatory scheme governing all CATV operations. Initially, the Commission adopted rules relating only to CATV systems which utilized microwave retransmission. *First Report and Order on Microwave-Served CATV,* 38 F.C.C. 683, 4 Pike & Fischer R.R. 2d 1725 (1965). The rules subse-

[81] The *Pan American* case makes clear that the principle is unaffected by the views of the administrative agency with respect to the question before the court—by the agency's wish, for example, that the court would take jurisdiction of the subject matter and thus relieve it of a troublesome regulatory problem. Thus it made no difference in *Pan American* that the Sherman Act suit had been brought by the Government at the request of the C.A.B.

quently adopted for nonmicrowave CATV systems such as petitioner's—aptly described by the court below as "detailed" and "carefully graduated" (A 1366-67)—are set forth and explained at length in the F.C.C.'s *Second Report and Order on Community Antenna Television Systems, supra* note 14.

In the *Second Report and Order* the Commission stated that CATV systems "have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." *Id.* ¶ 47. The Commission also found, however, that CATV operations raise certain specific problems from the communications point of view, and it employed its administrative expertise and flexibility to deal with these problems in carefully tailored ways. Thus, in order to assure local television stations (especially UHF) the audience in their service area represented by the subscribers of CATV, the Commission imposed (with exceptions not material here) a "carriage rule." That rule requires a CATV system to carry, upon request of the station, the signal of any station within whose B contour the system is located (sometimes referred to as the "local" station). *Id.* ¶¶ 66-67.[82] In order to protect the normal market of the "local" station, the rules prohibit CATV systems from carrying an "outside" signal which duplicates on the same day a program broadcast by the "local" station (*id.* ¶¶ 51-65).[83]

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[82] The rules also contain a general prohibition (subject to a grandfather clause and to possible waivers by the F.C.C. on the basis of a showing of consistency with the public interest) against CATV carriage of outside signals into the 100 most important television markets (*id.* ¶ 141).

[83] These regulations are similar to the carriage and nonduplication provisions earlier adopted with respect to CATV systems using microwave. See note 123 and Appendix pp. 105-109 *infra*.

In issuing the rules, the F.C.C. expressed the judgment that they "represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio."" *Second Report and Order* ¶ 109 (quoting and citing § 303(g) of the Communications Act, 47 U.S.C. § 303(g)).[84]

The decision of the court below, however, would impose a general rule of copyright-infringement liability for CATV systems. By subjecting CATV to the power of the copyright owners, it would substitute the control of private parties acting in their own interest for regulation in the public interest by the F.C.C.[85] Whereas the F.C.C. has expressed the judgment that its rules "represent a fair balancing of the competing interests" and serve the public interest "in the larger and more effective use of radio" as required by § 303 (g) of the Communications Act, the imposition of copy-

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[84] In testimony before the Senate Subcommittee on pending copyright revision legislation, (see pp. 63-64 and n. 77 *supra*), the Department of Justice has pointed out that the imposition of blanket copyright liability on CATV "may unjustifiably interfere with sound regulatory policies. . . . It would seem preferable to leave the FCC free to regulate CATV in terms of the public interest than to require it to regulate within the framework of a statute that may allow the networks or other copyright holders to control CATV." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 215.

[85] It has been noted that "These FCC carriage rules meet some, but not all, of the concerns of copyright holders," the "most substantial gain for the copyright holder" being the prohibition of CATV carriage into the top 100 markets. The commentator concludes that "for the present, the FCC's rules appear to strike a reasonable balance between protecting the interests of the copyright holders and achieving FCC objectives . . . ." Note, *CATV and Copyright Liability, supra* note 19, at 1531-32.

right liability, as by the decision below, would upset the balance and prejudice that public interest.

The decision below also puts the Copyright Act into direct conflict with a key element of the F.C.C.'s regulatory scheme. Whereas the F.C.C.'s "carriage rule" requires a CATV system to carry, upon request, the signal of a station within whose B contour it is located, the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage. Thus one federal law would impose liability for doing what another federal law requires.

It is no answer to say that the F.C.C. may revise its rules, if the copyright question is settled in respondent's favor, to require the station to obtain the consent of the copyright owner before requesting carriage by the CATV system. The copyright owner would either charge the station for that right—thereby subverting the F.C.C. policy in favor of aiding such stations by a free carriage requirement—or would authorize the station to request carriage but reserve the right to assert infringement liability against the CATV system itself—thereby restoring the result whereby the CATV system incurs liability under one law for doing what another law requires. The Commission said in the *Second Report and Order* that the public interest in promoting "maximum television service to all the people of the United States" under the Communications Act (¶ 47), requires that a CATV system carry all stations within whose B contour it is located. The copyright owner should not be granted the right to assert his private interests over that public interest, and to force the F.C.C. to revise its carriage rules in order to avoid the conflict.

The obvious solution to the serious conflict between the decision below and the copyright, antitrust and communications policies applicable to this case is to uphold the principle of statutory interpretation announced by this Court in *White-Smith* and to construe the word performance in its "ordinary sense."

IV.

THE COPYRIGHT ACT AND COMMUNICATIONS ACT COMPEL RECOGNITION OF A LICENSE IMPLIED IN LAW FOR SIMULTANEOUS OFF-THE-AIR RECEPTION BY THE PUBLIC OF A TELEVISION BROADCAST AUTHORIZED BY THE COPYRIGHT PROPRIETOR.

In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the radio station's broadcast of the copyrighted song had not been authorized by the copyright owner. This Court in its opinion accordingly noted that it had "no occasion to determine . . . the effect upon others of his [the broadcaster's] paying a license fee" (283 U.S. at 198), and in a footnote the Court said:

> "If the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Id.* at 199, n. 5.[86]

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[86] For this suggestion the Court cited *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Calif. 1929), where the broadcast had been licensed. The district court there made the alternative holding that a cafe owner who played the broadcast song to his patrons was protected from infringement liability by a license implied in law:

> "The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition. 40 F.2d at 736.

This question of a license implied in law for simultaneous off the air reception by the public of an authorized broadcast, which the Court left open in *Jewell-LaSalle,* is squarely presented to the Court for the first time in this case.[87] The court of appeals decided the question by ruling that the operations of petitioner's CATV systems in assisting public reception of the telecasts authorized by respondent were not protected by a license implied in law—that there was "no reason to deny plaintiff the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas."[88]

Recognition of a license implied in law for public reception (and for aiding public reception) of an authorized broadcast is compelled, petitioner submits, by the primary policy of the Copyright Act and the policy of the Communications Act, and is confirmed by the economic realities of the broadcasting industry.

A. License Implied in Law Under the Copyright Act

The primary copyright policy, as discussed above (pp. 58-62 *supra*), is to make available to the public the benefits of authors' works; the reward to the copyright owner is a "secondary consideration" justified only by its contribution to the primary objective. See *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954); *United States*

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[87] The court of appeals recognized that "The record on this appeal squarely presents the question whether such a license should be implied in law," and properly characterized the issue as "one of appellate first impression." A 1358, 1360.

[88] With respect to the court's assumption that not one of petitioner's subscribers could have satisfactorily received any one of the five stations by a "normal rooftop antenna," see pp. 84-90 *infra.*

v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); and other authorities cited at p. 59 *supra*.

In a long line of cases decided under the copyright and patent statutes,[89] this Court has recognized a classic situation in which the primary policy prevails over the secondary policy. This is the case in which the statutory monopolist, in return for a license-fee "reward," has released to the public a particular embodient of his patented invention or copyrighted work. In such a situation, so far as that particular embodiment of the work is concerned, the secondary aim of rewarding the monopolist in order to induce him to release his work to the public has been satisfied, and the primary policy applies to confer on the public an "implied license" to use and enjoy that embodiment of the work without having to pay a second royalty to the monopolist. So it has been held in cases where a patentee authorized the sale of a patented article, *e.g.*, *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453, 456 (1873), and where a copyright proprietor authorized the sale of a copy of a copyrighted book. *E.g.*, *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339 (1908).[90] The most recent decision of this Court up-

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[89] "Certainly the rights of the copyright owner are not greater than those of the patentee." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948).

[90] It is true that this Court in its *Jewell-LaSalle* opinion stated that the analogy based on the *Bobbs-Merrill* case was "inapplicable" to the situation presented in *Jewell-LaSalle*. 283 U.S. at 197 (quoted by the court of appeals here at A 1362). The situation there was decisively different from the one presented here, however, in that the broadcast there had not been authorized by the copyright owner. The Court recognized this by stating that it had "no occasion to determine" the effect of the broadcaster's "paying a license fee" (283 U.S. at 198) and by expressly leaving open the question of an implied license to receive an authorized broadcast (*id.* at 199, n. 5).

holding a license implied in law on such a basis was the second *Aro* case, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 493-500 (1964).[91]

As was suggested by this Court in *Jewell-LaSalle* and held by the district court in *Buck* v. *Debaum*, the case of a radio or television broadcast authorized by the copyright proprietor is another situation where this principle applies. When respondent licensed each of the five television stations to broadcast the copyrighted motion pictures, respondent released for reception by the public that broadcast—which in this case is the particular embodiment of the copyrighted work released to the public.[92] Respondent in its agreement with the broadcasting station negotiated a price satisfactory to it for releasing that broadcast for reception by the public. Hence respondent's release of the broadcast must be held to have exhausted the monopoly so far as reception of that broadcast was concerned. And the public must accordingly be held to have a license implied in law to receive that broadcast off the air for private viewing by the use of receiving equipment of its own choice—including reception aided by

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[91] The Court there said:

> "When the patentee has sold the patented article or authorized its sale and has thus granted to the purchaser an 'implied license to use', it is clear that he cannot thereafter restrict that use; 'so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent'." 377 U.S. at 497.

[92] The legally decisive nature of the release to the public is underlined by the free and public character of the radio spectrum and by the policy of the Federal Communications Act (see pp. 79-82 *infra*), which specifies that "broadcasting" is the dissemination of radio communications "intended to be received by the public." 47 U.S.C. § 153(o).

a CATV system such as petitioner's—without being subject to restrictions imposed by, or to the payment of a second royalty demanded by, the copyright owner for that reception.[93]

The implied license belonging to the public under the rule of those decisions is, of course, a license implied *in law*. It vindicates the public's right to receive and enjoy the particular embodiment of the copyrighted work released to it—in this case, the broadcast—regardless of any clauses inserted in the license agreement by the copyright owner purporting to restrict that right. The court below apparently recognized that at least some members of the public had a legal right to receive the broadcast released to the public by respondent, but it cut out of whole cloth, both factually and legally, the notion that respondent nevertheless could "limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas."[94] A 1363. Comparable license clauses purporting to restrict

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[93] Just as this Court held in the two *Aro* cases that "One royalty to one patentee for one sale is enough . . . ," *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 360 (1961) (Black, J., concurring), so here, one royalty to one copyright owner for one broadcast is enough. (The quoted statement from Mr. Justice Black's concurring opinion in the first *Aro* case states the holding of the Court in Part II of its opinion in the second *Aro* case, 377 U.S. at 493-500.)

[94] In fact, respondent has purported to limit its licenses to viewers who *do* receive the broadcasts through "normal rooftop antennas"—that is, who do not subscribe to CATV—regardless of whether they "can" receive by rooftop antennas. Respondent has also purported to limit some licenses to the Grade A contour of the station, regardless of how viewers outside that area received the broadcasts. See note 79 *supra*. The court below ignored these aspects of respondent's contracts. (With respect to the court's assumption that none of petitioner's subscribers "can receive" any of the stations by rooftop antennas, see note 111 *infra*.)

the public's use and enjoyment of the thing released to it were struck down by this Court in the second *Aro* case, 377 U.S. at 496-97. See also *Bobbs-Merrill Co.* v *Straus*, 210 U.S. 339, 351 (1908).[95]

It is also clear that the public's implied license to receive the authorized broadcasts off the air without paying a second royalty to a copyright owner such as respondent must protect petitioner, whose CATV service is chosen by members of the public as their preferred means of enjoying their right to receive. If petitioner's subscribers have such a right—and respondent has stipulated that their reception of the broadcasts does not make them guilty of infringement (see p. 5 *supra*)—they may not be compelled to "do it yourself"; they must be free to enlist the services of persons such as petitioner, if they so desire, without thereby incurring or imposing infringement liability. Such was the holding of this Court as to a private-businessman defendant in the second *Aro* case, 377 U.S. at 495, 498, 500; see Note, *CATV and Copyright Liability, supra* note 19, at 1520.[96]

Respondent tries to argue that the infringement liability would impose a charge merely on the CATV system, not on the viewer. As a practical matter, copy-

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[95] For patent cases striking down *territorial* restrictions comparable to those asserted by respondent here and expressly sanctioned by the court below (see pp. 64-65 *supra*), see, *e.g.*, *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453 (1873); *Keeler* v. *Standard Folding Bed Co.*, 157 U.S. 659, 664, 666 (1895); *cf. United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *Brulotte* v. *Thys Co.*, 379 U.S. 29, 1964).

[96] Under the ruling of the court below, petitioner's subscribers could indeed be liable for contributory infringement by virtue of their contracting for and inducing the "infringing" service of the CATV system. See note 39 *supra*.

right charges imposed on the CATV system would be costs which must ultimately be passed on to the subscribers. In reality the subscribing members of the public would bear the cost of the second license fee that respondent is demanding from the CATV system for the broadcast.[97]

The reasons given by the court below for rejecting the implied license are inadequate. The court distinguished on narrow grounds the long line of implied-license decisions by this Court, refused to consider whether the policy they reflect might be applicable to this case, and relied on a statement from *Jewell-LaSalle* despite this Court's express reservation of the license issue as one clearly not raised by the facts of that case. A 1361-62; see note 90 *supra*. The court below deemed this case to present the "very different issue" of "the divisibility of the copyright holder's exclusive right to perform," which it proceeded to decide with the *ipse dixit* that the copyright holder's "substantial freedom" to limit his licenses "would seem self evident." A 1362. In support of this, the court offered only the puzzling argument that "plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems." A 1363.[98] Finally, the court simply refused to consider the policy against double royalties

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[97] See Note, *CATV and Copyright Liability*, *supra* note 19, at 1526. These same subscribers have shared in the payment of the first fee, since the public pays for television programs indirectly by buying the products and services of advertisers.

[98] Besides being apparently another attempt to rely on the fallacious broadcaster analogy (see pp. 43-52 *supra*), the argument ignores the fact that, if petitioner's CATV systems somehow *were* in the position of the "licensee stations" vis-a-vis respondent, they would be originators of the program and there would be no question of respondent's demanding a second reward for a public broadcast for which respondent has already collected once.

embodied in this Court's decisions, stating that it involves "purely legislative considerations." A 1363.[99]

B. The Public's Right Under the Communications Act To Receive Broadcasts.

The license implied in law is grounded not only in the Copyright Act but in the policy of the Federal Communications Act as well.[100] It is clear that CATV presents not simply an issue under the Copyright Act, but an important concern for the national communications policy embodied in the Communications Act.[101] As was recently stated by Professor Benjamin Kaplan:[102]

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications. . . ." [103]

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[99] The court asserted that "the same problem of 'double payment' seems to be presented by any periodical which derives most of its revenues from advertising, but also charges for copies of the periodical, and allows special rates to certain classes of readers." A 1364. But this example does not involve payment of two copyright royalties, and does not invoke the policy of the Copyright Act at all.

[100] The policy of the Communications Act is of course also relevant—as are all the policy considerations applicable to the implied-license issue—to the issue of whether the operations of CATV systems such as petitioner's constitute a "performance" of copyrighted works in the first place. See pp. 58-72 *supra*.

[101] The conflict between the decision below and the F.C.C.'s rules governing CATV is discussed at pp. 67-72 *supra*.

[102] Kaplan, p. 58 *supra*, at p. 105.

[103] In testimony before a Senate Subcommitte with respect to the copyright revision bill and the applicability of copyright restrictions to CATV, the Register of Copyrights has stated:

> "It is the only major issue that is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications in this country for years to come. And of the principal disputed issues in revision it is by all odds the most complex." *Hearings pursuant to S. Res. 201 on S. 1006, supra* note 77, at 10.

The "declared purposes of the Federal Communications Act," referred to by Professor Kaplan (*supra* p. 58), were stated by Senator Dill in introducing the Radio Act of 1927:

> "First, and most important of all, radio in the United States is free. It is so free to the listener-in that anybody anywhere may listen in to any broadcasting whatsoever . . . ." 67 Cong. Rec. 12335 (1926).

The same policy was carried over into the Act of 1934,[104] as to which this Court has declared that "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943). The principle guaranteeing free public reception of licensed broadcasts is embodied, for example, in the Act's definition of "broadcasting" as "the dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(o) (1964). The meaning of this provision, as has been recently noted, is "that the homeowner has the right to receive any material which is broadcast over the public airways." Note, *CATV and Copyright Liability, supra* note 19 at 1520 (1967).

When Congress desired to make an exception to the Act's policy of free public access to broadcasts, it did so in explicit, limited fashion. Section 325(a) of the Act prohibits the "rebroadcasting" of the signals of a broadcasting station without the station's consent. 47 U.S.C. § 325 (a) (1964). It is clearly established that this section does not apply to CATV operations, since

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[104] See 78 Cong. Rec. 10969, 10987-88 (1934).

CATV is not a broadcaster and does not "rebroadcast." See authorities cited at note 47 *supra*.[105]

Apart from § 325(a) it is the policy of the Federal Communications Act that broadcasts licensed under that Act are intended for the free reception of the public.[106] This policy has been implemented by the

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[105] In 1959 the F.C.C. was of the opinion that § 325(a) should be amended to apply to CATV operations. *Report and Order on Impact*, etc., *supra* note 47, ¶67; *Hearings on VHF Booster and Community Antenna Legislation before Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess., 3-4, 14 (1959). That proposal would have had the same practical effect as the decision below, since an originating station would have had to obtain the permission of the copyright owner before granting consent for CATV reception of its broadcast. The F.C.C.'s proposed amendment was rejected by Congress; the provision for extending § 325(a) to CATV did not survive in the bill that reached the Senate floor (S. 2653, 86th Cong., 2d Sess.), and an attempt to restore it was withdrawn by its sponsor (Senator Allott) after floor debate. 106 Cong. Rec. 10528-30 (1960).

The F.C.C. no longer advocates extension of § 325(a) to CATV, describing itself as "not in a position to state whether a § 325(a) approach would be effective and fully consistent with the public interest." *Second Report and Order*, ¶153(iii). The Commission has instead instituted its comprehensive regulatory scheme for CATV. See pp. 67-71 *supra*.

[106] Respondent in the court below attempted to paint a frightening picture of disruption in the television industry if the public was held to have a license in law to receive public broadcasts. Respondent conjured up microwave relay of a big-city station's signals from one end of the country to the other, and so forth. Of course, no microwave was involved in this case—only off-the-air reception within and near the B contours of the stations. If it is to be determined that microwave relays or other specific practices in the television industry are undesirable from the viewpoint of communications policy, the proper body to make such a determination, and to impose restrictions tailored to the perceived evils, is the F.C.C. or Congress. The F.C.C. has in fact adopted microwave regulations (which are not at issue in *United States* v. *Southwestern Cable Co.*, No. 363, this Term) which now control the use of microwaves by CATV. 47 C.F.R. §§ 21.710-.714, 74.1001-.1083, 91.557-.561.

financing of television through commercial advertising —a method which distributes the cost of television viewing indirectly through the populace, and rejects the imposition on the public of direct charges for the right to receive ordinary television broadcasts. This policy, petitioner submits, is offended by the decision of the court below.

Free public reception is denied by a rule allowing the copyright owner to restrict, and impose a toll on, the reception of a station's broadcast by certain members of the public who choose to receive it by subscribing to a CATV system such as petitioner's. The Communications Act would prohibit the station itself from imposing such a restriction on the public's reception of its broadcast.[107] The result is equally inconsistent with the Act when attempted by a copyright owner. Once a copyright owner has licensed a television station to perform his copyrighted work in public through a broadcast, the owner must accept the nature of the broadcasting medium as governed by the Communications Act. See *Buck* v. *Debaum,* 40 F.2d 734, 736 (S.D. Calif. 1929), quoted at note 86 *supra.* The rule announced by the court below, which permits the copyright owner to restrict reception by the public and to impose a copyright toll on some members of the public for the right to receive broadcast television programs

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[107] Efforts to carve out an audience smaller than the whole community capable of receiving a broadcast have been forbidden by the F.C.C. from the first as inconsistent with the duty of a licensed station to broadcast to the public. *E.g., Scroggin & Co. Bank,* 1 F.C.C. 194 (1934). See *Functional Music, Inc.* v. *F.C.C.,* 274 F. 2d 543, 548-50 (D.C. Cir. 1958), *cert. denied,* 361 U.S. 813 (1959) (dictum); *cf. Richard C. Simonton, d/b/a Telemusic Co.,* F.C.C. Release No. 59-1032 (Oct. 12, 1959), 19 Pike & Fischer R.R. 35 (1959).

that their neighbors receive without charge, is not only unreasonably discriminatory but contrary to the policy of the Communications Act.[108]

Nor is that the only respect in which the decision below contravenes the policy of the Communications Act. The power given the copyright owner to restrict his broadcasting licenses in terms of "defined periods and areas or audiences," which the court below expressly approved (A 1362), offends not only the policies of the Copyright Act and the antitrust laws but also the authority given the F.C.C. by the Communications Act "to establish areas or zones to be served by any station." 47 U.S.C. § 303(h) (1964). This authority, which the Commission has relied on as one of the bases for its regulation of CATV,[109] would be supplanted, under the decision below, by control through restrictions in copyright licenses. Copyright owners would be permitted to erect their own "areas or zones to be served" by stations, and to enforce them through infringement suits against those who "contribute" to the "result" of reception by the public. And those members of the public in rural areas, small communities or elsewhere who are dependent on something more than a "normal rooftop antenna"[110] for good television reception will be deprived of those "maximum benefits" which it was the "avowed aim" of the Communi-

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[108] See the testimony of the Antitrust Division of the Department of Justice in *Hearings Pursuant to S. Res. 201 on S. 1006*, *supra* note 77, at 214; Note, *CATV and Copyright Liability*, *supra* note 19, at 1525-26.

[109] *Memorandum Opinion and Order on Community Antenna Television*, 6 F.C.C. 2d 309, 8 Pike & Fischer R.R. 2d 1677, ¶12

[110] See discussion, pp. 84-90 *infra*.

cations Act to secure for them. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943).

The policies of the Copyright Act and the Communications Act, as they apply to the subject of this case, are thus closely related. The objective of the Communications Act is the widest dissemination of broadcast service possible; the primary objective of the Copyright Act is to provide the public with the benefit of the artist's work. Both policies compel recognition of the public's right to receive through a CATV system such as petitioner's (without payment of a second royalty to the copyright owner) a broadcast from a station licensed under the Communications Act and authorized to make the broadcast by the copyright owner. They also require the conclusion that the public has a license implied in law to receive broadcasts off the air and to secure the assistance of third parties in order to exercise effectively their right to receive.

C. The Attempt of the Court Below To Limit the License in Law to Reception With a "Normal Antenna."

Unwilling to deny completely the existence of a public right to receive authorized broadcasts, the court below placed an express limitation on its holding that petitioner's CATV systems are liable for copyright infringement. The court stated (A 1366):

> "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work."

So far as this case was concerned, however, the court found that "no such viewers"—*i.e.*, no "viewers who can receive the broadcasts through normal rooftop antennas"—"were shown to be among defendant's subscribers." A 1363, 1365, nn. 13 and 14. In view of the court's *caveat* quoted above, its holding of infringement is necessarily conditioned on this finding.[11]

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[11] The finding—a new one by the court of appeals, on a question not addressed by the district court—is clearly erroneous.

The court of appeals recognized that the district court had made no finding on this question—suddenly deemed critical by the court of appeals—of what petitioner's subscribers "could have received" from the five stations if they had used "rooftop antennas" instead of subscribing to defendant's system. A 1365, n.14. The district court had made a finding—without indicating its relevance—that "No credible competent evidence was adduced which demonstrated that the residents of Clarksburg or Fairmont, other than the subscribers to defendant's systems, could receive a usable and reasonably satisfactory picture from any of the five television stations in Pittsburgh, Wheeling or Steubenville." A 35-36. On appeal, petitioner challenged this finding, and the court of appeals recognized that such "credible competent evidence" had indeed been adduced —in the form, for example, of undisputed testimony by petitioner's expert that some 10 to 15% of the locations in and around Fairmont, and 1 to 5% in Clarksburg, would be expected to receive satisfactory reception from the five stations without subscribing to the CATV system. A 1365, n.14 (the testimony is at A 911-913). Rather than acknowledging the district court's finding to be clearly erroneous, however, the court of appeals cut out of the district court's cloth a new finding, on which it proceeded to base its denial of an implied-in-law license in this case. The court below stated that the district court's finding "was made as to all the residents of Clarksburg and Fairmont," and that "at least as to defendant's subscribers, we do not find it clearly erroneous" (*ibid*), thereby manufacturing the new finding that *none of defendant's subscribers* could have received satisfactorily from any of the five stations by using a "rooftop antenna." In support of this finding, the court said only that "there was no testimony that any

The new standard which the court below has *sua sponte* fashioned, and suggested (without deciding) as the test of CATV liability for copyright infringement, doubtless was motivated by the desire of the court to delineate a service area of a television station within which a license in law to receive the broadcasts would be implied. The standard the court invented, however, is unsatisfactory because of its extreme ambiguity and its lack of relation to the economics and structure of the industry. The court did not consider, for example, *how many*, or *what percentage*, of a "CATV system's subscribers" would have to be able to receive a particu-

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of defendant's subscribers could have done the same"—*i.e.*, could have done what defendant's expert said 10 to 15% of the locations in Fairmont and 1 to 5% in Clarksburg could do—and that "defendant has apparently never contended that they could." *Ibid.* (For the latter assertion the court cited A 1253, which does not support the assertion.)

The court's new finding, on which its decision in this case depends, cannot stand. The undisputed testimony of petitioner's expert—to the effect that the specified percentages of the locations in Fairmont and Clarksburg could expect satisfactory reception of the five stations—cannot be limited, as the court of appeals arbitrarily assumed, by the assumption that none of these locations housed a subscriber to one of petitioner's systems. The expert was testifying about locations in Clarksburg and Fairmont in general (A 911-13), not about nonsubscribers to petitioner's systems. Of the many favorably situated locations to which he referred, there is no basis for assuming that none of them subscribed. Moreover, the expert's testimony was that the specified percentages of the locations could satisfactorily receive *all five* of the stations. Out of the much greater number of locations capable of receiving *at least one* of the stations, the court's finding means that *not one person* subscribed to petitioner's system in order to receive them all. The record provides no basis for any such unlikely assumption. Thus petitioner submits that the court's finding that none of petitioner's subscribers could receive any of the stations with a rooftop antenna —on which finding the decision below is based—is not only clearly erroneous on this record, but incredible on its face.

lar station by a "normal antenna" in order for the "different case" to be presented in which a copyright holder licensing a broadcast over that station might be held to have licensed "their" viewing of the work.[112] The court left open such questions as whether a system is to be held for infringement on some sort of *pro tanto* basis depending on the percentage of its subscribers who are not shown to be capable of receiving each station by a "normal antenna."[113]

Since the court's suggested standard is framed in terms of the license implied in law, it presumably places on the CATV system the burden of showing that the required number of its subscribers "could receive." See A 1363, n.13; 1365, n.14. The system would thus have the burden of producing affirmative proof, on a house-to-house basis, as to the reception capability of its variously situated subscribers. Moreover, since the court referred to reception of "one or more of the stations carried," and said nothing to indicate that

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[112] What follows if it is shown that some of the subscribers, or even a single one, could have received the station satisfactorily? Is there some magic number of subscribers that will do the trick?

[113] What kind of a device is it that the court refers to sometimes as a "normal antenna" (A 1366) and sometimes as a "normal rooftop antenna" (A 1363) or "rooftop antenna" (A 1365, n.14)? There are no F.C.C. regulations governing receiving antennas or specifying a "normal" or any other variety of antenna for use by the public. There are all kinds of antennas ranging greatly in price, type, and effectiveness. There are all-channel antennas, single-yagi antennas, stacked yagis, antennas with rotor devices to orient them in the direction of the desired signal, antennas with pre-amplifiers, with converters to change UHF to VHF channels, antennas on short masts, tall masts, rooftops, etc. Will the standard of "normality" change as new and better antennas are developed, so that a CATV system which is infringing today may not be tomorrow?

reception of one station authorizes reception of all, the proof would have to differentiate the reception capabilities of the various subscribers with respect to each of the stations carried on the system. Since few if any of the subscribers will have rooftop antennas on their homes, and since not many more will have recently *tried* to receive by erecting a rooftop antenna, the subscribers generally will not know whether they "could receive" any of the stations—and if so, which ones—with such an antenna.[114]

The burden of proof on a CATV system under the court's test would be so heavy, so expensive, and so riddled with uncertainties as to make it doubtful that the license to receive could ever in practice be established.

The court of appeals' test of reception capability could not be met by a CATV system—or an apartment-house "master antenna" system—operating within the same city or town as the station whose signal it carries. In cities such as New York, for example—where three CATV systems have been franchised, and where there are, of course, numerous "master antenna" systems—obstruction from tall buildings frequently makes reception of local stations unsatis-

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[114] The problems of offering specific proof of reception by rooftop antennas are shown by the testimony of respondent's witness Hill, a television repairman and dealer in Fairmont who had installed antennas for home reception in the early 1950's during the early days of petitioner's CATV system. Records were no longer available and he could not remember specific locations where antennas were installed. R 2423-29, 2438-40, 2444-47, 2452-58, 2467-72. These antennas were installed prior to the time that there was a station in Clarksburg or Weston. A 1286-89.

factory, especially for residents of lower-floor apartments.[115]

Even if the court's standard were workable, it would be inconsistent with the policies of the Copyright and Communications Acts. Under both statutes, members of the public who (in the court's words) could not receive the licensed broadcasters' signals satisfactorily by normal antennas, owing to the physical situation of their homes, are nevertheless just as entitled to receive those signals as are their more fortunate neighbors. They, too, are beneficiaries of the public's implied license to receive. The principle espoused by the court below that the copyright holder can impose a second royalty for *their* reception—that respondent can "limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas" (A 1363)[116]—is not

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[115] The Chairman of the F.C.C., Rosel H. Hyde, has testified to a Congressional Subcommittee as follows:

> "There are instances where the local station cannot provide a good signal to all portions of its normal service area because of terrain factors or man-made structures. This is true in New York City and some other metropolitan areas, within the very community where the TV transmitters are located. CATV helps remedy these situations by providing good reception of the local signal throughout the station's prescribed coverage area." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 79.

The court did not indicate what a "normal antenna" might be in the case of an apartment. Presumably it must mean the antenna on the television set or at the window of the apartment. It could not mean the master antenna operated by the landlord on the apartment house roof, since that is not the property of the tenant or on his premises, and since under the doctrine of "performance" propounded by the court below the master antenna system is precisely like a CATV system in being itself an infringing "performer." See pp. 53-55 *supra*.

[116] In fact respondent's licenses purport to go further than this. See note 79 *supra*.

only without factual basis in the record of this case, but is without justification in law.[117]

D. The Economic Realities With Respect to the Service Areas of Television Stations.

Petitioner submits that the Copyright Act and the Communications Act confer on the public as a matter of law the right to receive an authorized broadcast off the air, and that nothing in the law limits the right of the public to use whatever means it chooses, or whatever assistance it desires, in obtaining such reception. The court below recognized that such a right must exist, but proposed to limit it by a "normal antenna" test which is unjustified in law or in the facts of this case, and which in practice would make the right almost impossible to establish. If any limit were to be recognized, we submit that it would be more appropriate, and certainly more in accord with the realities of the television industry, to determine whether the CATV system and its subscribers are within the area where service by the broadcasting station was intended and anticipated as shown by the economic structure of the industry. In the present case such an inquiry demonstrates—as petitioner offered to prove—that petitioner's CATV systems were indeed within the economic service areas of the five broadcasting stations.

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[117] Unlike the court of appeals, respondent has consistently taken the position that there is no license in law for CATV systems to aid public reception even with respect to members of the public who unquestionably "could receive" the broadcasts without subscribing to the system. Respondent's claim has been that

> "It makes no difference . . . whether or not the people in Fairmont and Clarksburg can or cannot receive the signals from these five stations because . . . it is immaterial and irrelevant as to what the defendant is doing." A 1342; see also R 3195 ("irrelevant as a matter of law"); R 5177 ("wholly irrelevant").

Economically, from the point of view of both the advertiser who bought time and the copyright owner who licensed a broadcast, the service areas of the five stations included petitioner's CATV subscribers in and around Clarksburg and Fairmont. Petitioner offered to prove that respondent had in fact been paid by the broadcasting stations for the simultaneous reception of the broadcasts by the very members of the public who subscribed to petitioner's systems.[118] The court below properly recognized that since the district

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[118] In connection with its offer of proof, petitioner would have offered standard television-industry reference works, such as Television Factbook, published by Television Digest, Inc., in support of the inclusion of petitioner's CATV subscribers in the contemplated audiences of the five television stations here involved. (Respondent stipulated that it had subscribed to this publication since 1958. A 220.)

For example, Edition No. 33 of the Factbook, covering the period 1962-63 (the relevant pages of which appear at R 4293-96), published a map showing the Grade A and Grade B contours of each station and also showing, in shaded areas, the counties within the station's coverage. The book also shows the number of "TV homes" as computed by the ARB rating service; counties are listed by categories denoting three different degrees of "circulation" by the station: over 50% of the TV homes, between 25% and 50%, and under 25%. The information given in the volume for the five stations, with respect to viewers located in Harrison and Marion Counties, West Virginia (including Clarksburg and Fairmont, respectively), was as follows: For KDKA and WTAE in Pittsburgh and WTRF in Wheeling, Harrison and Marion Counties were included within the station's coverage area in the highest category of coverage, denoting that the station's circulation there was more than 50% of the TV homes. Pp. 520, 524, 675. For WSTV in Steubenville, Harrison County was in the over-50% category and Marion County in the 25-50% category. P. 470. And for WIIC in Pittsburgh, both counties were in the 25-50% category. P. 522. For each of the five stations, the total numbers of "TV homes" in each of the two counties were added to those of all the other counties covered by the station to produce a total figure of homes reached by the station.

court had rejected the offer of proof (A 1327), the facts asserted must be assumed to be accurate for purposes of appellate review. A 1360.[119]

Petitioner offered to prove, for example (see pp. 15-16 *supra*), that the "rating services" which measure television audiences have included in the audiences of the stations in Pittsburgh, Wheeling, and Steubenville the members of the public in and around Clarksburg and Fairmont, including the subscribers to petitioner's CATV systems, and that the stations were aware of

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[119] The court suggested, however, that the accuracy of the facts offered to be proved "seems debatable, at least so far as the royalties were based on revenues from local advertisers who might well have had little or no interest in reaching Clarksburg and Fairmont viewers . . . or even from national advertisers who wished to advertise in Clarksburg through other stations or media." A 1360-61. In this dictum the court failed to note that in one-half the situations in this case the CATV systems were within the B contours—the normal expected reception areas—of the stations. See p. 14 and note 16 *supra;* pp. 94-100 *infra.* Advertisers would routinely expect to pay for coverage within this area whether or not they wanted it.

It is instructive to note in this connection the testimony of the Deputy General Counsel of the Columbia Broadcasting System before the Senate subcommittee considering copyright revision. He supported "an exemption from copyright infringement for retransmissions of television broadcasts to subscribers within the normal coverage area of the television station initiating such broadcasts," and explained as follows:

> "The rationale for this proposal is that a copyright owner who licenses his work for television broadcast by a particular station can reasonably expect his work to be seen by all persons who live within the normal coverage area of that station. In this fact situation the copyright owner can be fully compensated by the royalties he receives for his licensing of broadcasting rights whether the audience sees the performance of his work on a television set connected to a conventional antenna, or on a television set which can receive a CATV system's retransmission." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 220.

this fact and advertised their circulation in these communities. A 1321-23. Petitioner offered further to prove that the station's time charges were related to the size of the station's television audience, so that both the advertising charges by the stations and the royalties paid to respondent by the stations took into account the fact that members of the public who would view the telecasts included those residing in and around Clarksburg and Fairmont (including petitioner's subscribers).[120] Thus, petitioner would have shown that respondent had not only received its reward for releasing the broadcasts to the public in general, but had been compensated for the broadcast "intended to be received by" the members of the public who subscribe to petitioner's CATV systems —from whom respondent is hence, clearly, demanding a *second* royalty.

The precise boundary of the service area of a station cannot be drawn without access to the facts relevant to that station's operation. But it is more realistic to look to the economic facts to see who was the intended public for which the broadcast was made and

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[120] Petitioner would have proved that respondent, in advertising the number of homes viewing some of its motion pictures (*viz:* its "Popeye" cartoons), had utilized the ARB rating service's totals of homes viewing those cartoons telecast by the Pittsburgh and Wheeling stations to which respondent had licensed them, and that these totals included homes in and around Clarksburg and Fairmont subscribing to petitioner's CATV systems. A 1322-23. Petitioner would also have shown that respondent entered into contracts with one of these very stations (the Wheeling station) wherein its royalty was measured by the station's income from time sales to advertisers for advertisements telecast in conjunction with respondent's films (A 1324), and that this station advised respondent in 1959 that the fees paid to respondent were based on, and higher because of, coverage secured by the station through CATV reception. R 4292.

for which the copyright owner was paid than to speculate on the ambiguities of reception by a "normal" antenna. The economic realities mark the service area in fact. CATV subscribers (as is true of petitioner's subscribers in this case) are included in the station audiences for whom the specific release of the copyrighted work was intended; the broadcast license fees paid to the copyright owners, therefore, cover the release to those subscribers.[121]

V.

ASSUMING ARGUENDO THAT THE GENERAL PUBLIC DOES NOT HAVE A LICENSE IN LAW TO RECEIVE AUTHORIZED BROADCASTS, THE POLICIES OF THE COPYRIGHT AND COMMUNICATIONS ACT COMPEL THE CONCLUSION THAT THE PUBLIC LOCATED WITHIN THE PRESCRIBED SERVICE AREA OF A BROADCASTING STATION HAS SUCH A LICENSE TO RECEIVE THE STATION BY THE AID OF A CATV SYSTEM.

As discussed above (pp. 12-14 *supra*), the normal service area of a broadcasting station is measured by the F.C.C. and by industry custom, pursuant to regulations of the F.C.C. (47 C.F.R. § 73.684), in terms of a "Grade A contour" and "Grade B contour." The B contour marks the boundary along which reception of "a quality acceptable to the median observer" is expected to be available at least 90 percent of the time

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[121] For references to advertisements and other data showing the general industry practice of counting CATV subscribers among the audience of a television station for purposes of advertising rates and copyright royalties, see *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the House Commm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 2, at 1281-82, 1284-85, 1302-06 (1965); *Hearings on Regulation of Community Antenna Television Before the House Commerce Comm.*, 89th Cong. 2d Sess., ser. 89-34, at 659-60 (1966); Note, *CATV and Copyright Liability, supra* note 19, at 1522, 1523 n.52.

at the best 50 percent of the receiver locations.[122] While recognizing that actual service may vary from the prediction, the Commission has recognized and em-

[122] *Sixth Report and Order, supra* note 13, ¶ 97. Acceptable reception of course does not end abruptly at the B contour, but beyond that line diminishes gradually. *Id.* ¶ 94.

The Grade B contour is a conservative description of a television station's service area. The criteria and methods for calculating the distance to the Grade B contour from the station's transmitting antenna were made on a specified reference assumption as to the power of the transmitter, antenna height, and antenna transmission characteristics, soil conductivity and terrain conditions (Id. ¶ 97 and n.5; 47 C.F.R. §§ 73.684, 73.699), and also with respect to "a typical home receiver installation such as the sensitivity of the receiver, the type of antenna, the installation of the antenna and the transmission line used" (*Sixth Report and Order* ¶ 101). In the original regulations the standards for the referenee receiving antenna were conservative and the standards for the sensitivity of the television set have not been changed to take into account improvements since 1951.

With respect to the television receiving set, the Commission assumed a receiver noise level (ratio of desired to undesired signal) typical of receivers in the early days of television, *Third Notice of Further Proposed Rulemaking, Television Broadcast Service,* 16 Fed. Reg. 3072, App. B, pt. II (1951) later approved and adopted in the *Sixth Report and Order* ¶¶ 97-98. Television set performance has substantially improved in the 17 years since issuance of the *Third Notice.*

The reference receiving antenna for engineering calculations was, as a "safety factor", assumed to be a nondirectional half-wave dipole receiving antenna instead of a directional antenna with higher gain (*Sixth Report and Order,* ¶ 95; *Third Notice, supra,* App. B, n. 4 and 8), notwithstanding the ready availability to the public of antennas of higher gain (A 880-81 and 910); and similarly it was assumed that the receiving antennas would be mounted on a 30-foot mast (*Sixth Report and Order* ¶ 92, and App. B, Figures 1-3; 47 C.F.R. ¶ 73.699, Figures 9 and 10) although homeowners could readily provide higher masts to improve their reception. See A 880.

If improvements in antennas and sets were to be taken into account, the number of predicted locations to which the Grade B field intensity could be realized would be higher than as predicted under the Commissioner's rules and accordingly the predicted service area of the station extended. *Cf. Sixth Report and Order* ¶ 101.

ployed the B contour as the rule-of-thumb measure of a station's normal coverage area both generally and in the specific context of CATV.[123] The F.C.C.'s comprehensive regulatory scheme for CATV requires that a CATV system carry upon request, subject to certain priorities and exceptions, the signal of any station "within whose Grade B contour the system is located.". Almost all CATV systems receive one or more stations within whose Grade B contour the system is located.

In the present case, as stated by the court of appeals, "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." [124] Thus, in one half of the ten system-contour situations presented, petitioner's CATV system and its subscribers are within or on the B[2] contour of the broadcasting station.[125]

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[123] See *Second Report and Order* ¶ 66. As early as 1962, the Commission was utilizing the B contour as a measure of a station's market area in the context of CATV. See *In re Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 462-63, 22 Pike & Fischer R.R. 193, 194c (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. den.* 375 U.S. 951 (1963). And the requirement of carriage of stations within whose B contour the CATV system was located was formally imposed on all microwave-served CATV systems in its *First Report and Order on Microwave-Served CATV*, *supra*, page 68, ¶¶ 85-92 (1965). The B contour measure of a station's service area and carriage requirement were reconfirmed in a general reconsideration of the Commission's CATV rules. *Memorandum Opinion and Order*, *supra* note 109, (1967). See also 47 C.F.R. 73.636(a)(1) ("duopoly" rule).

[124] A 1364. See pp. 14-15 *supra*.

[125] In none of the other five system-contour situations is the distance from Clarksburg or Fairmont to the B contour of the station substantial. Especially close are Fairmont to WIIC in Pittsburgh (Ex. H2, E405), and Clarksburg to WSTV in Steubenville (Ex. E2, E394) and to WTAE in Pittsburgh (Ex. I2, E409).

Petitioner submits that, when a CATV system thus operates within the B contour of the broadcasting station whose signal it receives and makes available to its subscribers, it is especially clear that the operations of the system must be held to be protected from copyright-infringement liability by a license implied in law under the Copyright Act and the Communications Act. For in such a case the system's subscribers are members not only of the general public but—assuming *arguendo* that the public may be divided up for this purpose—of the specific public to which the copyright owner, in fulfillment of the primary purpose of the Copyright Act, released the broadcast by licensing the station.[126] And they are also members of that specific public by whom—on the same *arguendo* assumption—the broadcast was "intended to be received" (free of charge) pursuant to the policy of the Communications Act.

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[126] As was pointed out by the Chairman of the F.C.C. in testimony with respect to copyright revision legislation:

> "I particularly mentioned the circumstances where a community antenna would serve entirely as a community antenna service, simply improving the delivery of the signal within the normal service area of the station. In such an area, the station would have purchased copyright privileges, and the improvement in its delivery would not seem to justify the addition of another charge. . . .
>
> ". . . . Well, actually what our regulations do is require that the local CATV system perform the function of a CATV system and carry the local station's signals. Actually in requiring the CATV system to carry the local station's signals, we are simply requiring of them that they perform an antenna service, not a distribution service. We do not believe in these circumstances that an additional copyright payment would be required." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 80.

The court below recognized that "it might be urged that courts should employ the B contour as an approximate measure of the range of normal reception," but rejected the idea on the basis that "the contours are mere theoretical estimates calculated without regard to actual terrain or interference," and on the basis of the court's own finding that there was no evidence that "any of defendant's subscribers" could have received "one or more of the stations carried satisfactorily by normal antennas." A 1365 n. 14, 1366.[127] If a court applying the Copyright Act were to adopt any standard as "an approximate measure of the range of normal reception"—for the purpose of limiting the public's implied license for CATV reception—it seems obvious that the standard should not be of the kind devised by the court below. The court's standard, based on whether the CATV system's subscribers "could receive" any of the stations by a "normal antenna," is not only vague and unworkable (see pp. 84-90 *supra*), but it would be dependent on the particular evidence in each case (indeed, on a house-to-house canvass) and would place on the CATV system an insupportable burden of affirmatively proving a hypothetical proposition.

Clearly, it would be better to choose as a standard the B contour, which is officially prescribed, widely recognized, and employed throughout the industry as the measure of a station's normal range. The B contour of every station in the country is already determined and readily available; maps showing the contours of each station are in the public file at the

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[127] The court's finding as to the inability of petitioner's subscribers to receive by normal antennas is discussed at note 111 *supra*.

F.C.C., and are widely published and utilized in the industry.

The accepted and useful nature of the B contour—and also the general acceptance of the proposition that CATV carriage of a station's signal within its B contour should not be restricted—are seen in the F.C.C.'s statement in issuing its comprehensive CATV rules that, under these rules, "with possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue." *Second Report and Order* ¶ 151.[128] Criticism of the F.C.C.'s utilization of the B contour for its carriage rule, on the ground that reception under actual conditions may vary from the predicted

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[128] The B contour as the normal service area where copyright liability would not apply was proposed by the House Judiciary Committee in its proposed Revision of the Copyright Act. With reference to § 111 of the bill (later removed from the bill for other reasons), the Committee report stated:

> "A key concept of section 111 is stated in subsection (a) (3): that a secondary transmission [CATV] is exempt if it is 'made for reception solely within the limits of the area normally encompassed by the primary transmission.' Under the definition added by the committee to section 101, the 'area normally encompassed' by a transmission is the 'entire geographic area within the radius that the transmitter's signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers.' As envisioned by the committee, a transmission's normal area at the present time would generally be the equivalent of its 'grade B contour' as defined in the regulations of the Federal Communications Commission. The definition in section 101 specifically empowers the Register of Copyrights to issue regulations that would 'further particularize this definition, taking into account any pertinent definition in a Federal statute or regulation.'" *H. R. Rep. No.* 2237, 89th Cong. 2d Sess., at 83 (1966).

contour (similar to the ground relied on by the court below), was summarily rejected by the F.C.C. in its general reconsideration of the CATV rules in early 1967. The Commission stated that "examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time." *Memorandum Opinion and Order, supra* at note 109, at ¶ 12 n. 6. The Commission expressed the view that "we regard this [B] contour as generally delineating the area within which service from the station can reasonably be expected." [129] *Id.*, at ¶ 32.

Petitioner submits that it is unnecessary for this Court to adopt any standard as the measure of the normal range of reception of a television station. The Court should rule that the operations of petitioner's CATV systems do not constitute a "performance in public" of respondent's motion pictures, or that in any event the policies of the Copyright and Communications Acts require recognition of a license implied in law for public reception of authorized broadcasts. However, if it should be deemed necessary to fashion a limitation to be placed on the scope of that license, petitioner submits that there should be no restriction on reception off the air; and in any event the minimum area for the public's right to receive is the B contour.

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[129] In its brief filed in *Midwest Video Corp.* v. *F.C.C.*, Case No. 18,348 (8th Cir., filed Mar. 9, 1966), an appeal pending before the Eighth Circuit, involving the jurisdiction of the F.C.C. to regulate CATV, the Commission stated with regard to the requirement of carriage of stations in the B contour (at p. 8 n. 7): "In general, it is fair to say that within the grade B contour a good picture is received . . . ."

CONCLUSION

The reasons why imposition of copyright liability on CATV is unjustified in law and policy were forcefully stated by the Department of Justice, when it said:

> "[W]e believe that this copyright proposal [for "blanket copyright liability" of CATV] may have harmful anticompetitive consequences. Moreover, we do not believe that it is compelled by any important interest underlying the copyright law. Finally, we believe that the problems with which it attempts to deal may be better handled through flexible regulation by the FCC uninhibited by a blanket copyright liability." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 215.

The judgment of the court below should be reversed.

Respectfully submitted,

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Dated: January 18, 1968

APPENDIX

Statutes and Regulations Involved

1. *Copyright Act, as amended.* Section 1(c) and (d) of the Copyright Act (17 U.S.C. § 1(c), (d) (1964)) provides as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> • • •
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; . . ."

2. *Communications Act of 1934, as amended.* Sections 1, 3(o), 303(c), (d), and (h), 307(b) and 325(a) (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b) and 325(a) (1964)) provide as follows:

> Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."
>
> Sec. 153(o). " 'Broadcasting' means the dissemination of radio communication intended to be received by the public, directly or by the intermediary of relay stations."
>
> Sec. 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall . . ."
>
> • • •
>
> (c). "Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;"
>
> • • •

(d). "Determine the location of classes of stations or individual stations;"

* * *

(h). "Have authority to establish areas or zones to be served by any station."

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Sec. 325(a). "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fradulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."

3. The regulations promulgated by the Federal Communications Commission related to CATV are set forth in 47 C.F.R. §§ 21.710-.714 (Point-to-Point Microwave Radio Service), §§ 74.1001-.1083 (Community Antenna Relay Stations), §§ 74.1101-.1109 (Community Antenna Television Systems), and §§ 91.557-.561 (Business Radio Service) (1967), *as amended,* 32 Fed. Reg. 914-16 (1967).

The pertinent provisions of the regulations as to carriage and nonduplication with respect to CATV systems generally are as follows (47 C.F.R. § 74.1103 (1967), *as amended,* 32 Fed. Reg. 914-15 (1967)):

"§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

"No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

"(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

"(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

"(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

"(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

"(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

* * *

"(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station li-

censee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

"(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted."

The pertinent provisions of the regulations as to carriage and nonduplication imposed as conditions in connection with licensing of microwave relay stations are exemplified by the following provisions (47 C.F.R. § 74.1033 (1967), *as amended,* 32 Fed. Reg. 914 (1967)):

"§ 74.1033. Licensing requirements.

"Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in the Community Antenna Relay Service to construct or operate point-to-point operational fixed stations to relay television signals to community antenna television systems (CATV systems), either directly or indirectly, will contain the following conditions:

"(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system

shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

"(1) First, all commercial and noncommercial educational stations within those principal community contours the system or the community of the system is located, in whole or in part;

"(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

"(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

"(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

• • •

"(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

"(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted."

• • •

There are substantially identical conditions in the regulations relating to the use by CATV of Point-to-Point Microwave Radio Service and Business Radio Service (47 C.F.R. §§ 21.712 and 91.559, *as amended*, 32 Fed. Reg. 914-16 (1967)).

[redacted]

INDEX

CITATIONS

Cases:

	Page
Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476	6
Bluefield Television Cable, 10 F.C.C. 2d 731	14
Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339	5, 7
Buck v. *Debaum*, 40 F. 2d 734	8
Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191	2, 4, 8
Clarksburg Publishing Co. v. *Federal Communications Commission*, 225 F. 2d 511	12
Folsom v. *Marsh*, 9 Fed. Cas. (No. 4901) 342	8
Fox Film Corp. v. *Doyal*, 286 U.S. 123	8
Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F. 2d 411, certiorari denied, 269 U.S. 556	4
Mazer v. *Stein*, 347 U.S. 201	6
Rosemont Enterprises, Inc. v. *Random House Inc.*, 366 F. 2d 303, certiorari denied, 385 U.S. 1009	8
SESAC v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1	2
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131	6
White-Smith Music Co. v. *Apollo Co.*, 209 U.S. 1	7
Constitution of the United States:	
Article I, Sec. 8, clause 8	6

288-954—68——1

Statutes and Regulations:

	Page
Copyright Act, 17 U.S.C. 1 *et seq.*:	
§ 1(c)	2, 3
§ 1(d)	2, 3
Federal Communications Act	6
47 U.S.C. 303 (h)	12
47 C.F.R. 73.683	12
47 C.F.R. 73.684(f)	14
47 C.F.R. 73.689	12
Miscellaneous:	
17 Fed. Reg. 3905 (FCC's Sixth Report and Order)	9, 12
31 Fed. Reg. 4540 (FCC's Second Report and Order)	9, 13
First Report and Order, 38 F.C.C. 683	14
H.R. 2512, 90th Cong., 1st Sess	16
Memorandum Opinion and Order, 8 Pike & Fischer R.R. 2d 1677	13
Nimmer on Copyright, § 145 at 646	8
Yankwich, *What is Fair Use?*, 22 U. Chi. L. Rev. 203	8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, PETITIONER

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari was granted in this case on December 4, 1967, and the Court invited the Solicitor General to express the views of the United States. This memorandum is filed in response to that request.

I

The overall problem is a large one, with substantial ramifications in the fields of copyright policy, communications regulation, and antitrust law. In the long run it requires a comprehensive plan of solution which can only be provided by legislation. Efforts toward achieving a legislative solution have been underway for some time. But the process of resolving the conflicting interests and pressures, private and public, in

a satisfactory and sensible way is a complicated and difficult one, and it is uncertain when it can be brought to a completion by Congress. In the meantime, this Court is faced with the problem of deciding the question of CATV liability for alleged infringement under the existing copyright law. The Court's decision in the instant case may contribute to the ultimate legislative solution.

II

With respect to the basic question considered below, we conclude that the court of appeals was correct in deciding that the activities of the CATV systems constitute a "public performance" within the meaning of Sections 1(c) and 1(d) of the Copyright Act (17 U.S.C. 1(c), 1(d)). To be sure, arguments can be made, and were made in the courts below, that no "performance" is involved where a CATV system merely furnishes signals which result in pictures only on the home sets of subscribers. But we believe the language of the Copyright Act should be read in light of economic and technological realities. Whether the precedents relied on by the courts below, such as *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, and *SESAC* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y.), are directly pertinent is not, in our view, of controlling significance. Those cases—and other like decisions—do reflect a basic approach which should obtain here. Because the Copyright Act was enacted before CATV came into existence, there is no direct evidence of congressional intent. We must therefore seek an answer to the question whether CATV service results in infringing public performances by

construing the relevant statutory provisions in light of new technology, keeping in mind that the Act gives the copyright owner the "exclusive right" to "exhibit, represent, produce, or reproduce [the copyrighted work] in any manner or by any method whatsoever" (17 U.S.C. 1(c)).[1]

As the district court pointed out, CATV systems provide something more than simply an antenna service. It stated (App. 20a):

> * * * Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs—operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas.

So viewed, it seems clear that CATV systems engage in a significant array of activities directed toward providing television signals to persons at least some

[1] Similar language is likewise contained in Section 1(d) of the Act. Section 1(c) requires that the public performance be "for profit" for copyright protection to apply; Section 1(d), which relates only to dramatic works, does not include such a requirement. Here the difference is of no significance since no contention was made that the public performances, if any, were not for profit (see App. 1345, n. 1).

of whom would not otherwise be able to receive them and who are willing to pay for such service. It is established that there can be multiple performances of a copyrighted work occurring simultaneously, and that it is of no consequence that the actual rendition takes place in the privacy of a number of homes, rather than in public. *Buck* v. *Jewell-LaSalle Realty Co., supra,* 283 U.S. at 198; *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411 (C.A. 6), certiorari denied, 269 U.S. 556. Whether one focuses on the electronic process involved, or simply on the fact that CATV systems do a substantial amount of things to permit their subscribers to receive signals, it is difficult to disagree with the conclusions reached below—that CATV carriage of a copyrighted work results in a "public performance" within the meaning of the Copyright Act and thus subjects the systems to liability where they infringe the copyright owner's "exclusive right" without having obtained a license to do so.

What a CATV system essentially does is to deliver a signal to the subscriber. That the signal, by itself, is not intelligible without the intervention of further equipment is of no moment. The fact is that the signal does "reproduce" the copyrighted work in a "manner" or by a "method" as effectively as if the CATV system made a tape recording of the copyrighted work and offered it for sale to persons who had equipment capable of converting the recording into a visually observable representation. There can be no doubt that the tape recording would be a reproduction—just as an undeveloped photograph would be a

reproduction, and an infringement of a copyrighted original, even though the purchaser was required to carry out the steps which would make the image intelligible to the human eye and mind. CATV activities are not different in kind; the image is present within the system, and it is provided to the consumer by the CATV intermediary. It simply cannot be gainsaid, in our view, that this constitutes the sort of reproduction which is within the ambit of the Copyright Act.

III

The question remains whether there is in the law, or should be established in the law by this Court, any limitation on the "exclusive right" of the copyright owner. Such limitations are not foreign to the copyright field. There is, for example, the doctrine of "fair use," which provides some qualification of the exclusive right. That doctrine does not appear directly applicable here, since we are dealing with a large-scale commercial enterprise, which, in the aggregate, involves great expenditures for equipment and millions of potential viewers (but see *infra*, p. 8). Nor does the so-called "first sale" doctrine, another recognized limitation on copyright liability, appear pertinent here.[2] On the other hand, a "license implied in law" might appropriately be said to apply at least to some CATV activities. Of course, a "license implied

[2] Under the "first sale" doctrine a copyright owner who has authorized the sale of a copy of his work can no longer control the resale or physical use of the copy, *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, although he can prevent the reproduction, recording, or performance of his work from the copy.

in law" is not a license at all, but is simply a rule of law fashioned by the courts in order to take care of practicalities, equities, and other factors in a given situation.[3]

Under authority given in the Constitution, Congress grants a monopoly through the copyright law for the express purpose of promoting "the Progress of Science and Useful Arts" (U.S. Constitution, Art. I, Sec. 8, cl. 8). Copyright protection should be viewed against the background of the purpose which it is intended to further. That purpose obviously does not require assuring copyright owners the highest possible profits in all cases. Rather, what is essentially involved, from the point of view of sound public policy, is to provide an atmosphere in which authors have a strong incentive to create and disseminate their works, and are given the opportunity to obtain fair remuneration for the use of them. *E. g., Mazer* v. *Stein,* 347 U.S. 201, 219; *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 158.

Another objective to be kept in mind is minimizing the potential for monopolization of an industry. In a very real sense, the Federal Communications Act, at least in the instant context, and, to a considerable extent, the antitrust laws as they have developed, are factors to be considered in interpreting and assessing the application of the existing copyright law. These

[3] An "implied-in-law license" concept has been developed to some extent in the field of patent law. It is narrow in scope, and has been used primarily in two areas: (1) use and resale, and (2) repair or improvement of patented articles. See, *e.g., Aro Mfg. Co.* v. *Convertible Top Replacement Co.,* 377 U.S. 476, 497.

can be harmonized by recognizing the impact of the conclusion reached as to the copyright law question here presented on the development of independent and competing elements in the industry.[4] Just as in *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1, 18, where it was concluded that copyright protection did not extend to player piano rolls—a new development not contemplated by Congress—this Court could hold that until Congress acts specifically it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area. In sum, as this Court observed in *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346: "The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

We recognize that there is a significant lack of precedent for the implication of a copyright license

[4] It should be noted that, in contrast to the relatively diffuse condition of the CATV industry, the control of copyrights on television programming is concentrated in the three networks and seven major movie studios. Antitrust considerations thus argue strongly against the imposition of the structure of these older industries on the young CATV industry, which could occur were the networks and film studios to obtain control of CATV systems. Moreover, the larger CATV systems have some potential, if they develop independent of domination through control of access to programming, of ultimately becoming significant originators of programs and thus competitors of the existing networks, a development which may well be in the public interest.

288-954—68——2

in light of policy considerations. The *dictum* in *Jewell-LaSalle* (283 U.S. at 199, n. 5) is not persuasive authority, and the holding in *Buck* v. *Debaum*, 40 F. 2d 734 (S.D. Calif.), while arguably in point, appears to involve the only situation in which a court has taken such a step. Nevertheless, and despite the absence of any specific provisions in the Copyright Act, analogous holdings do exist, such as in the development of the so-called "fair use" doctrine. See, *e.g.*, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), certiorari denied, 385 U.S. 1009.[5] Nor should the absence of definitive precedent in any event be decisive. The same judicial flexibility in construing the Copyright Act which admits of its application to new developments in technology should similarly obtain, in our view, in recognizing underlying considerations of public policy, such as the limited nature of copyright protection and the consequences of extending copyright protection unduly. See, *e.g.*, *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127.

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[5] Under the "fair use" doctrine a third party, not in privity with the copyright owner or his licensee, may, notwithstanding the absence of any specific provision in the Copyright Act, engage in certain acts of copying without being subject to liability under the Act. That doctrine thus provides a useful analogy for the approach which we suggest here, both because application of the doctrine results in the third party having what may fairly be called an implied-in-law license to copy (see Yankwich, *What is Fair Use?*, 22 *U. Chi. L. Rev.* 203, 214 (1954), and because under the doctrine, as in the present case (see *infra*, pp. 10–11), a "central question" is whether the alleged infringer's activity "tends to diminish or prejudice the potential sale of the plaintiff's work" (*Nimmer on Copyright*, § 145, at 646; and see *Folsom* v. *Marsh*, 9 Fed. Cas. (No. 4901) 342, 348 (C.C.D. Mass. 1841); Yankwich, *supra* at 213).

It was contended in the lower courts that even if a public performance of copyrighted works resulted from CATV carriage of television signals, a license implied in law should be found to exist generally in favor of the CATV systems. It was suggested that such a license should be found as to all programs carried, whatever their source and wherever reproduced. On this issue we agree with the courts below. Implication of a license in all circumstances would be tantamount to holding that once a copyrighted work was licensed to anyone it was irrevocably and entirely committed to the public domain. There seems to be no basis for such an implication, and it would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy. In addition, it would be inconsistent with sound regulation of the nation's television resources, as expressed in the channel-allocation plan devised by the Federal Communications Commission pursuant to the specific congressional mandate to maximize television service through the extensive use of local stations.[6]

On the other hand, the economic realities of the broadcasting industry suggest the appropriateness of

[6] See the F.C.C.'s Sixth Report and Order, 17 Fed. Reg. 3905. Reference should also be made to the congressional policy favoring the development of UHF stations which, the Commission noted in its Second Report and Order, 31 Fed. Reg. 4540, were likely to suffer significantly from the unrestrained growth of CATV in metropolitan areas. In large part this difficulty stemmed, in the Commission's view, from the fact that CATV systems, unlike broadcasters, have not paid for programming which they provide, resulting in a situation of unfair competition between CATVs and independent and UHF stations.

implying a more limited license for CATV activities. Television stations of course subsist through the sale of advertising time to commercial sponsors. Advertising revenues are ordinarily measured by the size of the audience which the sponsor of a particular program is able to reach. Television stations also pay royalties to copyright owners for the right to perform copyrighted works. Where a station's audience is increased as a result of CATV carriage of its signals, an increase in advertising revenues can be expected, so long as those viewing the programs are within the category of persons the advertiser seeks to reach. And where advertising revenues are increased, it might be expected that copyright owners can obtain greater royalties for licensing the performance of their copyrighted works.

However, much of the advertising which accompanies the performance of copyrighted works, such as motion pictures, is directed solely at potential viewers who are within the station's normal service area—"local" advertising and "national spot" advertising both fall within that category. Such advertisers do not necessarily derive any significant commercial benefit from CATV carriage of the sponsored programs outside of the market ordinarily served by the particular station, and accordingly may be unwilling to pay additional amounts for such expanded coverage. Transmission of a sponsored program into a distant market, where CATV penetration is substantial, may also significantly decrease the potential audience in that market for the program and adversely affect the advertising revenues which a local station there could otherwise expect to obtain from program sponsors.

Should this happen, the net result may be to diminish the value of a copyrighted work in the distant market without any corresponding increase in the copyright owner's royalties from the originating market.

In short, CATV carriage of copyrighted works within the licensed station's normal service area cannot be expected to have a substantial adverse impact on the incentive to create, while extension of the station's signals outside that area may well have such an effect.

IV

The considerations just discussed would point in the direction of implying a license for CATV carriage of signals within the normal service area of the originating station. It remains, however, to find a workable measure of this area.

In the courts below it was suggested that, at least in those areas where the signals carried by CATVs could be directly received off-the-air by potential viewers, without the need for CATV service, an implied-in-law license to perform copyrighted works should be found. This suggestion was rejected by the district court (App. 88a), but the question was specifically reserved by the court of appeals. It stated (App. 1366):

> A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder's licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work.

What the court appears to suggest is that an implied-in-law license might be found where, but only where, it is shown that a station's signals can be satisfactorily received by "normal" or "rooftop" antennas (see App. 1364–1366); since such a showing was lacking here, it found it unnecessary to resolve the question.

In our view, the tentative suggestion made by the court below does not provide a useful touchstone, for there will undoubtedly be a large variety of opinions as to what constitutes a normal, rooftop antenna and what amounts to satisfactory reception, and repeated disputes about the scope of a station's ordinary service area, if so measured. Such an approach would simply never provide, with any degree of certainty, a workable definition of the geographical area within which a license for CATV carriage might be implied. There is, however, another possibility, which was considered and rejected by the court of appeals (see App. 1365, n. 14). That is to measure the scope of the implied license by reference to the "Grade B contour" of the originating station,[7] a concept developed by the Federal Communications Commission under its authority "to establish areas or zones to be served by any station" (47 U.S.C. 303(h)). Here the areas served by the CATV systems were within the Grade B contours of some of the stations carried (see *infra*, p. 16). Thus, if this approach were to be followed, an implied-

[7] A Grade B contour is defined as the line which defines the area at the perimeter of which a good picture can be expected for 90 percent of the time at the best 50 percent of the locations. Sixth Report & Order, 17 Fed. Reg. 3905, 3915; see 47 C.F.R. 73.683, 73.689; see also *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516, n. 12 (C.A.D.C.).

in-law license would exist as to some of the signals carried.

In its Second Report and Order the Federal Communications Commission explicitly noted the valuable and useful function which CATV systems provide in supplementing off-the-air television service and in improving the variety and quality of television reception in various parts of the country. In asserting jurisdiction over non-microwave CATV in 1966, the Commission's essential purpose was only to regulate the growth of CATV along lines consistent with the public interest. To protect local stations, the Commission adopted its local carriage and non-duplication requirements, both of which in substance require a CATV system located within the Grade B contour of a television station to carry that station on its system and not duplicate its programming by carrying another, more distant station when both are broadcasting the same program. In addition, the Commission adopted a distant-signal rule applicable to CATVs in the top 100 television markets, which again is geared to the Grade B contour concept and which prohibits the extension of signals beyond a station's Grade B contour into one of these major markets except after an evidentiary determination in each case that such extension would not be detrimental to local television service in the affected area.[8]

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[8] In discussing the Grade B contour concept in Memorandum Opinion and Order, 8 Pike & Fischer R.R. 2d 1677, 1691, the Commission recently stated:

> We think that the Grade B contour is a reasonable demarcation between a distant and local signal. See Section 303(h) of the Communications Act. We regard this contour as generally delineating the area within which service

Accordingly, it is our view that, in rejecting the use of Grade B contours, the court of appeals unnecessarily discarded a valuable guide for determining where an implied-in-law license should be found. We acknowledge that there are difficulties inherent in adopting a rather technical and artificial concept such as predicted Grade B contours as the sole criterion in determining the copyright liability, or exemption therefrom, of CATV systems. As presently calculated, such contours are theoretical estimates which do not precisely measure the actual range of a station's signal in all situations. Moreover, they are subject to change as a result of changes in the power of a station or in the location of its transmitter. Indeed, the whole "contour" concept may become obsolete if (through satellite and other improvements) a station's signals can be extended to encompass the entire continent. What is more, the Commission itself has recognized that the *predicted* Grade B contour of a station—calculated without taking into account differences in terrain or special conditions creating interferences—is only an approximation of the normal service area. That body accordingly permits the parties to demonstrate, in a given case, that the *actual* contour is different. First Report and Order, 38 F.C.C. 683, 730–731; *Bluefield Television Cable,* 10 F.C.C. 2d 731, 732; 47 C.F.R. 73.684(f).

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from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the Grade B contour in order that the station may have access to all persons within this general service area. Beyond this point the CATV system is, in a real sense, extending the service area of the station by markedly changing the quality of the signal being received * * *.

In our view, however, the inexactness and instability of the predicted Grade B contour as a measure of a station's service area is probably outweighed by the certainty it provides as to much of the area covered. The predicted contour line is currently the only perimeter readily identifiable by reference to a map. At least until uniform and reasonably simple procedures for measuring "actual" contours are developed—a task now underway—we believe that "predicted" Grade B contours provide the most feasible tool for defining, however roughly, the normal service area of the originating station. Within that area, we suggest, a license to carry the programs may generally be implied.

We add only a *caveat* for special situations in which, because an area served by a CATV system is within the city grade or Grade A contour of local stations, it might appear unfair to imply a license to carry copyrighted works licensed to other stations whose Grade B contours include that area, at least where it can be shown that the local and outside stations actively seek exclusive licenses to perform the same works.[9] Of course, that problem arises however one defines a station's normal service area. In our view, it is a matter that can properly be left for case-by-case resolution, and which, in any event, will hope-

[9] To use a local example, Baltimore TV stations place a Grade B signal over Washington, as do the Washington TV stations over Baltimore. However, in both communities the truly local signals, being more powerful (*i.e.*, city grade), are largely watched, with the result that the copyright owner can give an exclusive license for his film in Baltimore, without significantly impairing the value of the exclusive license he sells to the Washington station. A Washington CATV system, with an unqualified implied license in law to carry the Baltimore signal, thus could markedly affect the value of the license to the Washington station.

fully be taken care of by legislation (see note 10, *infra*).

Adoption of the approach we have suggested would result in a substantial coalescense of communications and copyright policy with regard to CATV. With perhaps minor exceptions, no adjustment of the Commission's local-carriage rule would be required, and each policy would tend to support the other. Nor is it irrelevant that implying a license for CATV carriage of signals within the Grade B contour of the originating station coincides, at least in rough outline, with the most likely legislative resolution of the matter of CATV copyright liability for the future.[10]

V

If a development of the law along these lines is adopted, the judgment below should be vacated insofar as it rejected petitioner's claimed exemption where it did not carry signals beyond the Grade B contour of the originating station—which was the fact with respect to four of the five signals distributed to Fairmont subscribers, and one of the five signals brought

[10] Legislation which eventuates may well follow the pattern of the Kastenmeier bill (H.R. 2512, 90th Cong., 1st Sess., Sec. 111), which, in substance, established three zones in which CATV copyright liability would differ. One was the normal service area of the station carried, which probably would be measured, as a matter of fact, by the Commission-prescribed Grade B contour—in this area no copyright liability would result from CATV carriage of the station, except where a station providing a higher grade signal had obtained an exclusive license for a particular work. In unserved or underserved areas outside a station's normal service area, compulsory licensing of copyrighted works at reasonable royalties would be required. In other areas full copyright protection would be accorded.

into Clarksburg—and the case remanded to the district court to determine whether there are any special circumstances of overlapping (see *supra,* p. 15) which might argue against implying a license on the particular facts involved. Of course, such a ruling would dispose of the present case without fully resolving many of the problems posed by CATV operations under the existing copyright law. Although the approach we suggest would substantially lighten the burden, the matter of CATV liability for past infringement would remain. Nor does this resolution of the problem provide for reasonable royalty arrangements, compulsory licensing in certain areas, or a workable royalty payment scheme. And the approach outlined does not offer an incentive to CATV growth in unserved and underserved areas, where the potential harm to copyright owners seem less serious.

Some of these matters, it seems to us, are more appropriately dealt with by negotiation between the parties. Others are perhaps more fittingly solved by legislative action. At least, we are unable to suggest an acceptable construction of the Copyright Act that would permit their determination in judicial proceedings. Nevertheless, we submit that the approach urged here, in taking into account underlying policy considerations to the extent consistent with the limits of existing law, points in a direction that will facilitate the ultimate solution of the question in the public interest.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
(a) The proceedings below	2
(b) The facts	4
(c) The decisions of the Courts below	9
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. THE COURT BELOW CORRECTLY CONCLUDED THAT IN DOING WHAT IT DID, PETITIONER PUBLICLY PERFORMED THE COPYRIGHTED MOTION PICTURES WITHIN THE MEANING OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT	15
(a) Petitioner "performed" the copyrighted works	15
(b) Petitioner's performances of the copyrighted works were public performances	23
(c) The Court below fashioned no "new doctrine of infringement by contribution", and devised no "new theory of contributory performance"	26
II. BY LICENSING BROADCASTS OF ITS COPYRIGHTED MOTION PICTURES, RESPONDENT DID NOT, AS A MATTER OF COPYRIGHT LAW, LOSE ITS EXCLUSIVE RIGHT UNDER SECTIONS 1(c) AND 1(d) TO PERFORM THEM PUBLICLY AND PETITIONER INFRINGED SUCH RIGHT BY RETRANSMITTING THE BROADCASTS OF THEM WITHOUT RESPONDENT'S CONSENT	28
(a) A "license implied in law" is a contradiction in terms	28
(b) Making exceptions to unqualified statutory rights is a lgeislative function	29

Page

(c) That a copyright owner licenses another publicly to perform his work, does not "release" it to the public 33

(d) There is no analogy in the cases dealing with sales of chattels 37

(e) Copyright owners may license others to exercise their exclusive rights at given places or within specified geographical areas 40

(f) In publicly performing copyrighted works by relaying and distributing broadcasts of them, CATV is not doing what the public has a right to do 43

(g) One royalty for each public performance for profit of his work is the copyright owner's lawful due 44

(h) A non-statutory exception to the statutory rights of copyright owners cannot be based on speculation as to possible future "anticompetitive consequences" 45

III. NEITHER THE COMMUNICATIONS ACT NOR ANY POLICY THEREOF OR THEREUNDER HAS BY IMPLICATION REPEALED OR AMENDED OR OTHERWISE CREATED AN EXCEPTION TO SO MUCH OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT AS GRANT TO THE OWNER OF THE COPYRIGHT IN A MOTION PICTURE THE EXCLUSIVE RIGHT TO PERFORM IT PUBLICLY, THAT WHEN THE COPYRIGHT OWNER HAS LICENSED ITS BROADCAST BY A TELEVISION STATION, PETITIONER MAY, WITHOUT THE COPYRIGHT OWNER'S CONSENT, PERFORM IT PUBLICLY BY RETRANSMITTING THE BROADCAST WITHIN THE THEORETICALLY PREDICTED BOUNDARY OF THE WIDEST SERVICE AREA OF SUCH TELEVISION STATION—ITS SO-CALLED GRADE B CONTOUR—OR ELSEWHERE 52

(a) The Solicitor General's proposal, and petitioner's contention 52

(b) The "communications policy with regard to CATV" is expressly subordinate to, and wholly consistent with copyright 53

Page

(c) The economic realities demonstrate that CATV carriage of broadcasts of a television station within its Grade B contour will have a substantial adverse effect on copyright owners 59

(d) The Communications Act and the Copyright Act deal with wholly different subjects on different planes. They are not in *pari materia*, and the Communications Act neither expressly nor impliedly repeals or amends any provision of the Copyright Act, and the Congress did not intend it to do so 64

(e) The "right" to receive broadcasts, if there is such a "right", does not import any right to retransmit broadcasts of copyrighted works to the public for profit, without the copyright owner's consent 67

(f) That the retransmission of a broadcast of a copyrighted work is limited to places within the Grade B contour, so-called, of the station broadcasting such program, does not dispense with the necessity of security the copyright owner's consent. The Grade B contour concept is wholly irrelevant 69

CONCLUSION 71

APPENDIX 1a

CITATIONS

CASES:

Adams v. *Burke*, 17 Wall. 453 (1873) .....37, 41, fn. 16, 41

Alfred Bell & Co. v. *Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951) 47

Allen Bradley Co. v. *Local Union No. 3*, 325 U.S. 797 (1945) .....fn. 26, 65

Aro Mfg. Co. v. *Converticle Top Replacement Co.*, 365 U.S. 336 (1961) 44

Page

Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) ..... 37, fn. 14, 38, 43, 44

Bauer & Cie. v. *O'Donnell*, 229 U.S. 1 (1913) ..... fn. 14, 38, 39, 40

Bloomer v. *McQuewan*, 14 How. 539 (1853) 41

Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339 (1908) 36, 37, 38, 39, 40, 47

Brulotte v. *Thys Co.*, 379 U.S. 29 (1964) ..... fn. 17, 42

Buck v. *Debaum*, 40 F. 2d 734 (S.D. Cal. 1929) ..... fn. 10, 29

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) ..... 18, 19, 21, 25, fn. 10, 29, 37, 39, fn. 15, 40, 45, 46, 52, 64

Cable Vision, Inc. v. *KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 71

Columbia Broadcasting System v. *Teleprompter Corporation*, Civil Action No. 64-3814, U.S. District Court for the Southern District of New York. . fn. 24, 49

Columbia Pictures Corp. v. *National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) ..... fn. 11, 30

Commissioner v. *Beck's Estate*, 129 F. 2d 243 (2d Cir. 1942) 60

Cravens v. *Retail Credit Men's Ass'n.*, 26 F. 2d 833 (M.D. Tenn. 1924) ..... fn. 11, 30

Davilla v. *Brunswick-Balke Collender Co. of New York*, 94 F. 2d 567 (2d Cir. 1938) ..... fn. 22, 48

Davis v. *E. I. Dupont de Nemours & Company*, 249 F. Supp. 329 (S.D.N.Y. 1966) ..... fn. 22, 48

DeForest Radio Telephone & Telegraph Co. v. *United States*, 273 U.S. 236 (1927) 34

Dun v. *Lumbermen's Credit Association*, 209 U.S. 20 (1908) ..... fn. 11, 30

Edison v. *Lubin*, 122 Fed. 240 (3d Cir. 1903) 19

Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1932) 31, 32, 36, 64

F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) ..... fn. 22, 48

General Motors Acceptance Corp. v. *U.S.*, 286 U.S. 49 (1932) 66

Page

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175 (1938) ..... 34, fn. 17, 42

Goldsmith v. *C.I.R.*, 143 F. 2d 466 (2d Cir. 1944), per L. Hand, J., cert. denied, 323 U.S. 774 34

Green v. *Electric Vacuum Cleaner Co.*, 132 F. 2d 312, 314 (6th Cir. 1942), cert. dismissed, 319 U.S. 777 fn. 14, 38

Harms, Inc. v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959) 19

Interstate Circuit, Inc. v. *U.S.*, 306 U.S. 208 (1939) ..41, 47

Irving Berlin, Inc. v. *Daigle*, 31 F. 2d 832 (5th Cir. 1929) 37

Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F. 2d 411, 412 (6th Cir. 1925), cert. denied, 269 U.S. 556 ..... 18, 19, 24, 29, 30, 31, 46

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 16

Keeler v. *Standard Folding-Bed Co.*, 157 U.S. 659 (1895) ..... 40, fn. 16, 41

Manners v. *Morosco*, 252 U.S. 317 (1920) 41, 42

Mathews Conveyor Co. v. *Palmer-Bee Co.*, 135 F. 2d 73 (6th Cir. 1943) ..... fn. 11, 30

Mazer v. *Stein*, 347 U.S. 201 (1954) 35

Messager v. *British Broadcasting Company, Ltd.*, 138 L.T. 571 (C.A. 1928), [1928] 1 K.B. 660 (C.A.) Mem.; [1927] 2 K.B. 543 ..... 24, 25

Metro-Goldwyn-Mayer Distributing Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932) ....19, fn. 17, 42

Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942) 47

Pan American World Airways, Inc. v. *U.S.*, 371 U.S. 296 (1963) ..... fn. 26, 65

Posadas v. *National City Bank*, 296 U.S. 497 (1936) .. 66

Red Rock v. *Henry*, 106 U.S. 596 (1883) 65

Remick Music Corp. v. *Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944), aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied, 329 U.S. 809 (1947) 18

Page

Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), cert. denied 385 U.S. 1009 ..... fn. 11, 30

Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964) 47

Shapiro, Bernstein & Co. v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (9th Cir. 1966) modifying *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (S.D. Cal. 1963) and 243 F. Supp. 999 (S.D. Cal. 1965) fn. 22, 48

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) ..... fn. 22, 48

Society of European Stage Authors and Composers v. *New York Hotel Statler Co.*, 19 F. Supp. 1-6 (S.D. N.Y. 1937) ..... fn. 10, 29, 45

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 (1917) dissent of Mr. Justice Holmes 60

Temco Electric Motor Co. v. *Apco Mfg. Co.*, 275 U.S. 319 (1928) ..... fn. 14, 38

Tiffany Productions v. *Dewing*, 50 F. 2d 911 (D. Md. 1931) ..... fn. 17, 42

U.S. v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) fn. 17, 42

U.S. v. *General Electric Co.*, 272 U.S. 476 (1926) 40, 41

U.S. v. *Hutcheson*, 312 U.S. 219 (1941) ..... fn. 26, 65

U.S. v. *Jackson*, 302 U.S. 628 (1938) 65

U.S. v. *Loew's, Incorporated*, 371 U.S. 38 (1962) 47

U.S. v. *Paramount Pictures*, 334 U.S. 131 (1948) 35, 47

Washingtonian Pub. Co., Inc. v. *Pearson*, 306 U.S. 30 (1939) 36

Washingtonian Pub. Co., Inc. v. *Pearson*, 140 F. 2d 465 (D.C. Cir. 1944) ..... fn. 22, 48

West Publishing Co. v. *Edward Thompson Co.*, 175 Fed. 833 (2d Cir. 1910) ..... fn. 11, 30

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 16, 17, 18, 31

Wilbur-Ellis Company v. *Kuther*, 377 U.S. 422 (1964) fn. 14, 38

Wilmot v. *Mudge*, 103 U.S. 217 (1881) 65

Wood v. *U.S.*, 41 U.S. 342 (1842) 66

Woodman v. *Lydiard-Peterson Co.*, 192 F. 67 (Minn. 1912) ..... fn. 22, 48

STATUTES: Page

Communications Act, Section 2(a), Tit. 47 U.S.C. § 152(a) 65, 2a
Section 325(a), Tit. 47 U.S.C. § 325(a) ... 67, fn. 27, 68

Copyright Act, Sections 1(c), 1(d), Tit. 17 U.S.C. §§ 1(c), 1(d) ..... 2, 9, 13, 16, 19, 21, 23, 29, fn. 12, 31, 65, 1a
Section 1(e), Tit. 17 U.S.C. § 1(e) 19, 1a
Section 115(b), Tit. 17 U.S.C. § 115(b) 49

Patent Act, Section 1:
Tit. 35 U.S.C. § 154 ..... fn. 14, 38
Tit. 35 U.S.C. § 271(a) ..... fn. 14, 38

Tit. 28 U.S.C. § 1292(b) 3

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CONGRESSIONAL:

Bills: S. 597, 90th Cong., 1st Sess. ..... fn. 13, 33
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* So cited herein. The lengthy title is followed by the description, "First Report and Order". It is indexed in 38 FCC as "Rules re Microwave Served CATV".

** So cited herein. The official title is followed by the description, "Second Report and Order". It is indexed in 2 FCC 2d as "CATV".

*** So cited herein. The lengthy official title is followed by the description, "Memorandum Opinion and Order". It is indexed in 6 FCC 2d as "CATV".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

1. Whether when petitioner receives a television broadcast of a copyrighted motion picture, amplifies and otherwise processes it electronically, and then relays and distributes it by cable to the television receiv-

ing sets of its 15,000, or so, paying customers, petitioner publicly performs such copyrighted motion picture in any manner or by any method whatsoever, within the meaning of sections 1(c) and 1(d) of the Copyright Act; *and, if so,*

2. Whether by licensing the television broadcast of the motion picture, its copyright owner, as a matter of law, loses his exclusive right under sections 1(c) and 1(d) of the Copyright Act to perform it publicly to such extent that petitioner does not infringe such right when, without authority of the copyright owner, it so publicly performs it; *or*

3. Whether the Communications Act or policies thereof create, or warrant the creation of an exception to the exclusive right of copyright owners under sections 1(c) and 1(d) of the Copyright Act to perform their works publicly, so that when a television station broadcasts a copyrighted motion picture with the consent of its copyright owner, petitioner infringes no such right in so performing it publicly (a) anywhere, or (b) anywhere within the theoretically predicted boundary of the widest service area of such television station, its so-called Grade B contour.

STATEMENT

(a) *The proceedings below.* Respondent, as the owner of the copyrights in certain motion pictures, brought this action against petitioner for infringement of its exclusive right to perform them in public in any manner or by any method whatsoever, granted by sections 1(c) and 1(d) of the Copyright Act. A 21-23, 130-154; Pet. B. 10[illegible].

Petitioner's answer raised numerous issues, and the District Court by pre-trial order separated two of such issues for prior trial and determination. A 25, 26, 155-183, 187, 188. The decision of the Court of Appeals here under review, affirmed, upon an interlocutory appeal under Tit. 28 U.S.C. § 1292(b), the non-final decision of the District Court, 255 F. Supp. 177; A 19-107, in respect only of such two issues. A 1343; 377 F. 2d 872. In its opinion, A 1344-5; 377 F. 2d at 874; the Court below succinctly described the two issues before it as follows:

> This interlocutory appeal * * * presents the question whether the * * * CATV * * * systems operated by defendent [i.e., petitioner] * * * infringed the exclusive right of plaintiff [i.e., respondent] * * * to perform its copyrighted motion pictures in public * * * by receiving and transmitting by coaxial cable to their paying subscribers the signals of television broadcasting stations * * * which were licensed to broadcast the motion pictures. A further issue is whether, if defendant's CATV system did perform plaintiff's copyrighted motion pictures in public, they had a license implied in law to do so.

The issues reserved by the District Court for subsequent trial and determination, *and which are yet to be tried,* have been described by petitioner in general terms adequate for present purposes, as follows, Pet. 9, fn. 4:

> Reserved under the pre-trial order for subsequent trial were affirmative defenses * * * including issues concerning the validity of the plaintiff's [i.e., the respondent's] asserted copyrights, the existence of a license implied in fact by reason of

(among other things) plaintiff's course of conduct in dealing with television stations, and the issue of estoppel, as well as copyright misuse and antitrust defenses and the question of damages.

(b) *The facts.* Three television broadcasting stations in Pittsburgh, Pa., and one each in Wheeling, W. Va. and Steubenville, Ohio,[1] broadcast certain motion pictures under licenses of respondent as their copyright owner. Without respondent's consent, petitioner, a private business corporation, in operating its two so-called CATV systems, commercially and for profit, received such broadcasts, amplified and otherwise processed them electronically, and then relayed and distributed them by cable to television receiving sets in the homes and commercial establishments of its 15,000, or so, paying customers in and about Clarksburg and Fairmont, W. Va., Pet. B. 3, 4, 8-10; A 36-38, 1346.[2]

In so doing, petitioner employed highly sophisticated electronic equipment having an estimated replacement value of between $750,000 and $1,000,000. A 38, 44-59, 970-973, 1347-1349; E 267, Pet. B. 8-12.

Petitioner's estimated annual revenue from its 15,000, or so, paying customers was in the neighborhood

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[1] KDKA-TV, WIIC-TV and WTAE-TV, in Pittsburgh, WTRF-TV in Wheeling and WSTV-TV in Steubenville.

[2] "Pet. B" references are to the petitioner's brief; "Pet." references are to the petition; "A" references are to the first three volumes of the Appendix; and E references are to the fourth, or exhibit volume of the Appendix. "U.S. Mem." references are to the memorandum for the United States. For definitions of a CATV system, see Brief for the United States, etc., in *U.S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, p. 3, and fn. 3, p. 3.

of, and probably exceeded $675,000. E 180.[3] Between 1953 and 1963, petitioner's customers increased from fewer than 3,000, to more than 15,500, and as the Court below noted, by 1960 the number of petitioner's customers "was over half the number of occupied housing units counted by the United States Census of Housing in the area" that year. A 219-20, 1346-7. More precisely, the figure for Clarksburg appears to have been about 72 percent and that for Fairmont, about 73 percent. A 37, 775-6; E-261.

Clarksburg is beyond the theoretically predicted boundary of the widest service area—the so-called Grade B contour calculated under regulations of the Federal Communications Commission—of each of the three television broadcasting stations in Pittsburgh, as well as that of the station in Steubenville. It is, however, within the Grade B contour of the station in Wheeling. Fairmont is beyond the Grade B contour of one of the Pittsburgh stations, but within the Grade B contours of the station in Wheeling and of another of the Pittsburgh stations, and is on those of the Steubenville, and the third of the Pittsburgh stations. E 394, 397, 401, 405, 409; A 1364. As the Court below noted, A 1364:

> The Grade B contour, calculated on the basis of the height of the station's transmitting antenna

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[3] While the record does not show petitioner's profits, it has been reliably reported that so-called cable television or CATV companies such as petitioner have had profit ratios ranging up to 72 percent of revenues and 59 percent of capital, i.e., fixed equipment before depreciation. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) Table 9 at p. 28; Table 10 at p. 30.

> and of the terrain within a two-to-ten mile radius of the antenna in accordance with tables prescribed by the Federal Communications Commission, mark the boundary along which service "acceptable to the media observer" is *theoretically* expected to be available *90 per cent of the time at the best 50 per cent of the locations.* See 47 C.F.R. § 73.684; FCC Sixth Report and Order on Television Allocations, 1 (Part 3), 91 Pike & Fischer R.R. 601, par. 97 (1952) [Emphasis supplied]

Contrary to such theoretical prediction, however, as petitioner points out, because of the nature of the terrain in the Clarksburg-Fairmont area, "television reception there has not been easy". Pet. B. 7. In fact, as the Court below observed, petitioner's own expert testified that satisfactory reception of the broadcasts of television stations in Pittsburgh, Wheeling or Steubenville might be expected *in only 10 to 15 percent of the locations in and about Fairmont, and in only 1 to 5 percent of the locations in and about Clarksburg.* A 910-913, 1365, fn. 14.[4] Thus, so far as concerns the Clarksburg-Fairmont area, it is clear that the *facts* fell far short of the *predictions* made under the regulations of the Federal Communications Commission, and the Court below rejected the predicted B

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[4] The Court below held that "there was no testimony", in effect, that any television set connected to petitioner's cable was at any such favored location, or, in other words, that, on the record, it does not appear that any of petitioner's customers could have received the broadcasts of the Pittsburgh, Wheeling or Steubenville television stations satisfactorily "off the air". A 1365, fn. 14; A 35, 36. While petitioner attacks this holding strenuously, it points to nothing in the record which refutes it. Pet. B. 85, fn. 111. Indeed, it could not. E 97, 103, 228, 234, 235, 237, 239, 258. The Solicitor General appears to agree that there was no showing that any of petitioner's customers could have received the broadcasts in suit off the air. U.S. Mem. 12.

contours of these television stations "as an approximate measure of the range of normal reception" of their broadcasts, for the very reason that, A 1365, fn. 14:

> the contours are mere theoretical estimates calculated without regard to actual terrain or interference conditions and, *as the record here demonstrates,* "under actual conditions, the true coverage may vary greatly from these estimates". 47 C.F.R. §683(a). [Emphasis supplied] [5]

The caveat quoted by the Court below is from the Federal Communications Commission's regulation prescribing the method of calculating broadcasting stations' contours, and, with specific reference to the picking-up and retransmission of broadcasts for profit by entrepreneurs [6] such as petitioner, the Commission has said, *First Report and Order,* 38 FCC 683, 730, 731 (1965);

> In dealing with * * * the carriage * * * requirements, we have made liberal use of the * * * contour concepts * * *. * * * these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction * * * are based on * * * assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a prima facie presumption as to the location of signal con-

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[5] The petitioner itself concedes, Pet. B. 95, 96, that:

> While recognizing that actual service may vary from the prediction, the Commission has recognized and employed the B contour as the rule-of-thumb measure of a station's normal coverage area * * *.

[6] The term is petitioner's. See, e.g., Pet. 44, 46.

> tours. * * * however, any party, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere.

Thus, even assuming, *arguendo,* that the B contour has relevancy, its actual location is always open to a showing that it lies elsewhere than as predicted in accordance with the Federal Communications Commission's regulations. Here, as the Court below has found, A 1365, fn. 14, "the record * * * demonstrates" that off the air reception in the Clarksburg-Fairmont area of broadcasts of Pittsburgh, Wheeling and Steubenville stations did not in fact meet the B contour requirements of the Commission.

The Clarksburg-Fairmont area has not been dependent for television service on the stations in Pittsburgh, Wheeling or Steubenville. For, two local television stations have been broadcasting, one from Clarksburg since 1957, and another from Weston, W. Va., since 1960.[7] A 1286-1288. While the record is silent as to the Weston station, it is clear that broadcasts of the Clarksburg station have been readily and satisfactorily received off the air in the Clarksburg-Fairmont area. A 743, 1303. The Clarksburg-Fairmont area is within the boundaries of the predicted A contours of both such stations, calculated in accordance with the Federal Communications Commission's regulations.[8] Ac-

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[7] WBOY-TV in Clarksburg, and WJPB-TV, now WDTV, in Weston.

[8] Certified predicted contour maps of both stations, on file with the Federal Communications Commission, are being lodged by respondent with the Clerk of the Court. See, Pet. B. 12, 13. The predicted A contour, which demarks an area closer to a broadcasting station than its predicted B contour, marks the boundary along which service acceptable to the median observer is expected to be available at least 90 percent of the time at the best 70 percent of locations. Pet. B. 13, fn. 13; Brief of the United States, etc. in *U.S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, p. 15, fn. 13.

cordingly, any part of the Clarksburg-Fairmont area within the predicted B contour of any of the broadcasting stations in Pittsburgh, Wheeling or Steubenville, is also within the predicted A contours of the broadcasting stations in Clarksburg and Weston. Operating in the same area, petitioner and the broadcasting station in Clarksburg—and presumably the station in Weston—were, naturally, in competition with one another for viewers on the basis of the programs they offered. A 35. See, e.g., E 99, 100, 115, 204, 221, 222, 223. The issue here is, simply whether petitioner, like the Clarksburg and Weston stations, should pay for its use of copyrighted programs.

Petitioner's retransmission of broadcasts of copyrighted motion pictures without the copyright owner's consent, is in contrast with the strenuous objection it made when the Clarksburg television station—one of its customers—without petitioner's consent, rebroadcast over its own facilities a broadcast of a Pittsburgh television station it had received on petitioner's cable. A 794-798; E 262-264.

(c) *The decisions of the Courts below.* Both Courts below held for respondent on both issues before them, concluding that in doing what it did, petitioner publicly performed the copyrighted motion pictures within the meaning of sections 1(c) and 1(d) of the Copyright Act, and that petitioner did not have a "license implied in law" so publicly to perform them. A 19-107, 1343-1367; 255 F. Supp. 177; 377 F. 2d 872.

SUMMARY OF ARGUMENT

1. In holding that "the technical means by which the result is produced are irrelevant", and that petitioner "performed" and "publicly" performed copyrighted motion pictures when it received, relayed and distributed television broadcasts of them to its thousands of customers, the Court below applied in the case of a new technology, basic and well-settled legal principles which have been applied by this Court in cases of earlier new technologies. The exclusive right of a copyright owner to "perform" his copyrighted works "publicly" extends expressly to all such performances "in any manner or by any method whatsoever", no matter how new or novel, and extends to wholly new technologies whose advent is still in the future. The essence of "performing" a work lies in communicating the pictures and sounds which comprise it, in whatever form they may be, to where they will become visible and audible to prospective viewers and auditors, if they choose to see and hear them. Just as it has been held by this Court that the single rendition of a copyrighted musical selection can result, when broadcast, in more than one public performance, so, too, the single playing of a copyrighted motion picture, when broadcast, can result in more than one public performance. Petitioner's relaying and distributing of a broadcast of a copyrighted motion picture to its thousands of paying customers is itself a performance of such work, just as a broadcast is, and like a broadcast, constitutes a public performance, and not multiple private performances although petitioner's customers, like the members of a broadcaster's audience, see the "show" in the privacy of their own homes. To hold otherwise would be to fail to recognize the substance

and reality of the matter, no less than the object and intent of the Copyright Act. When petitioner tunes-in on a broadcast for its own commercial purposes, it necessarily assumes the risk that in doing so it may infringe the performing right of another.

2. A "license implied in law" is a contradiction in terms. Petitioner's claim is, actually, that as a matter of law, a copyright owner who licenses a public performance of his work by broadcast, thereby loses his exclusive right publicly to perform his work, to such extent that petitioner does not infringe it when petitioner publicly performs such work by receiving the broadcast, and then relaying and distributing it to its 15,000, or so, paying customers. But the exclusive right granted by the Copyright Act to copyright owners publicly to perform their works for profit in any manner or by any method whatsoever, extends, as this Court has held, "expressly" to *all* such performances, and no exception is made by the Act for such performances in the manner or by the method employed by petitioner, or any other. The Congress has neither expressly nor impliedly evinced any purpose or intention that there be any such exception, and the "license implied in law" for which petitioner contends is, as the Solicitor General makes clear, but a legal fiction to cloak what would be the bald establishment of an exception to the unqualified statutory rights of copyright owners, by the exercise of "judicial flexibility". This Court has held that neither principle nor authority permits any such impingement of the exclusive performing rights expressly granted to copyright owners by the Copyright Act. The "fair use" doctrine does not involve whittling away of the statutory rights of copyright owners by any such means. Nor is

"judicial flexibility" involved in decisions whether and to what extent the Copyright Act applies to technologies developed after its enactment. The licensing of public performances for profit of copyrighted works is not analagous to the sale of copies of copyrighted works, as this Court has held, and, by the same token, it is not analogous to the sale of chattels embodying a patented invention. Licenses of rights granted by copyright, and licenses of patent rights may be for limited geographic areas, and cases under the copyright, patent and antitrust laws forbidding territorial restrictions on the resale of goods and chattels are inapplicable to such licenses. In licensing a television station to broadcast his work, a copyright owner merely waives, in favor of the licensee, and no one else, his exclusive right publicly to perform his work at the time and place, and in the manner and by the method specified in the license. Since a copyright owner's exclusive right is *to perform* his work publicly, and not *to view* public performances of it, he has no "viewing rights" to license, and it is a concept alien to copyright that by licensing another publicly to perform his work, a copyright owner impliedly, or otherwise, licenses the public to view it. Even if it be assumed, *arguendo,* that the public has a "right" to view broadcasts of copyrighted works, it does not follow that petitioner may, without the consent of the copyright owner, publicly *perform* such works by relaying and redistributing such broadcasts to the public. The law provides a whole arsenal of weapons to prevent and redress misuse or abuse of copyright, and although copyright, like any other right, may be misused or abused, there is no need to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade. In principle, there is no difference

between petitioner's primary claim, which the Solicitor General rejects, to a "license implied in law", which would permit petitioner, without the copyright owner's consent, to retransmit to members of the public anywhere, broadcasts of copyrighted works, wherever they may originate, and petitioner's alternative claim, which the Solicitor General supports with a caveat, that petitioner may do so within the broadcasting station's so-called Grade B contour.

3. The Copyright Act and the Communications Act are not in *pari materia,* and the Communications Act does not expressly or impliedly repeal, amend or modify the provisions of sections 1(c) and 1(d) of the Copyright Act which expressly reserve to copyright owners the exclusive right to all public performances for profit of their works. Nothing in the legislative history of the Communications Act, or elsewhere, indicates any purpose or intention of the Congress that the Communications Act should have any such consequence. Any "right" of individual members of the public under the Communications Act to view broadcasts does not encompass a right to retransmit broadcasts of copyrighted works for profit to other members of the public without the copyright owner's consent. The Solicitor General and petitioner, to support their position that an exception should be established to the clear statutory right of copyright owners, for the commercial retransmission of the broadcast of a copyrighted work within the Grade B contour of the television station broadcasting the work, invoke "communications * * * policy with regard to CATV". But, the only communications policy with regard to CATV is to lessen the competitive advantage that CATV has had over broadcasters because broadcasters pay for their copyrighted programs, while CATV neither pays for its programs, nor honors

the rights of broadcasters to exclusivity under their licenses. Such policy was specifically adopted by the Federal Communications Commission as subordinate to copyright, and expressly for the sole purpose of remedying the unhealthy consequences of the inability, up to now, of copyright owners to enforce their rights in respect of retransmissions of television broadcasts of their works. The Solicitor General and petitioner would have this Court, in topsy-turvy fashion, give primacy over copyright policy, made plain by the Congress in the Copyright Act, to a communications policy, adopted by the Federal Communications Commission grounded on no communications need other than to alleviate the evils resulting from the nonenforcement of the very rights of copyright owners that the decision of the Court below would enforce.

The *a priori* "economic realities" on which the Solicitor General and petitioner rely have no foundation in the record, and, in large measure, appear to have no foundation in fact, and are contrary to respondent's experience and understanding. The Grade B contour concept is the *theoretically predicted* widest service area of a broadcasting station, computed under regulations of the Federal Communications Commission, on the basis of assumptions as to terrain and other factors which may or may not conform to the fact in any given case. The Commission considers it a mere "rule of thumb". Here, as the Commission has acknowledged might occur in any case, the fact falls short of the theoretical prediction, and the Grade B contours of the broadcasting stations in suit are beyond their actual service areas, which do not include the territory into which petitioner retransmitted their broadcasts of respondent's works. The Grade B contour is a concept

developed by the Federal Communications Commission to serve administrative needs, and is subject to modification or abandonment by the Commission, as those needs change, or when some other concept serving the Commission's administrative needs better, is developed. It would be anomalous to tie an exception carved out of the rights of copyright owners under the Copyright Act to an administrative regulation of an agency having no responsibility for copyright, and which can be modified or abandoned by such agency at any time for reasons wholly alien to copyright. The "economic realities" on which the Solicitor General relies cannot serve to create an exception to the statutory rights of copyright owners. The "limited license" proposed by the Solicitor General, is no less than the broader license for which petitioner primarily contends, "inconsistent * * * with the terms of the statute, existing precedents * * * [and] sound policy", to use the Solicitor General's words.

ARGUMENT

I

THE COURT BELOW CORRECTLY CONCLUDED THAT IN DOING WHAT IT DID, PETITIONER PUBLICLY PERFORMED THE COPYRIGHTED MOTION PICTURES WITHIN THE MEANING OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT.

(a) *Petitioner "performed" the copyrighted works.* The jargon of electronics, to which petitioner resorts to describe the "sole activity by which" it claims it is "alleged to have 'performed' the copyrighted motion pictures", Pet. B. 12, is descriptive not of what petitioner does, but, rather, of how it does it. In petitioner's predecessors' words on other occasions, what petitioner does is, E 3, 15, 34, 53, 72:

> to * * * operate a system of distributing and relaying television broadcasts and *other* communica-

> tions of pictures, sounds and other signals of all kinds by means of wire, cable, or other like connections to television or other receiving sets of subscribers to its service * * *. [Emphasis supplied]

It is patently futile to argue that when petitioner engages in "distributing and relaying television broadcasts" which are "communications of pictures [and] sounds" comprising copyrighted motion pictures, it is not "performing" them. For, the essence of "performing" a work lies in communicating the pictures and sounds which comprise it, in whatever form they may be, to where they will become visible and audible to prospective viewers and auditors, if they choose to see and hear them. Cf. *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 61 (1911).

It is, of course, immaterial whether such communication is effected by unaided or projected light and sound waves, by emitting radio and television waves, or, as petitioner does, by amplifying, processing and retransmitting the electromagnetic radiation of television broadcasts. For, the exclusive right reserved to copyright owners by sections 1(c) and 1(d) of the Copyright Act is, explicitly, to perform their works publicly "in any manner or by any means whatsoever". As this Court held in *Kalem*, 222 U.S. at 61, "the essence of the matter * * * is not the mechanism employed, but that we see the event or story lived". Nothing in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), on which petitioner relies, Pet. B. 29-33, militates against this conclusion.

In *White*, the question was whether a player-piano roll was a "copy" of "a musical composition" copyrighted under the provisions of a former act, which

gave the copyright owner "the sole liberty of copying * * * the same". The composition as copyrighted was in the form of sheet music, in familiar staff notation. In holding that a player-piano roll was not a "copy" of such sheet music, this Court pointed to: (1) Prior decisions of lower federal courts, and of English courts, to that effect, followed by a series of amendments to the Copyright Act which left such decisions undisturbed. This, this Court noted, 209 U.S. at 14, "might well be taken to be an acquiescence in the judicial construction given to the copyright laws"; (2) The extension by the Congress of the benefits of the copyright laws to foreigners, in the face of an international copyright convention, to which the United States was not a party, but which clearly provided that the manufacture and sale of such devices as player-piano music rolls were not infringements of copyright. The Court noted, 209 U.S. at 15, that "It could not have been the intention of Congress to give foreign citizens * * * advantages in our country which, according to that convention, were to be denied to our citizens abroad"; (3) Old judicial decisions defining "copy" to mean, in effect, a facsimile copy only. The Court noted, 209 U.S. at 17, that "When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard." These musical tones are not a "copy" of the "tangible thing" for which the statute "has provided for the making and filing" and "against the * * * duplication of which it is the purpose of the statute to protect the composer".

Thus, the Solicitor General's statement, U.S. Mem. 7, that *White* involved a "new development not contemplated by Congress" is manifestly incorrect.

On the contrary, this Court plainly held in *White* that player-piano rolls had, indeed, been contemplated by the Congress, and that the Congress had manifested an intention that they not be considered "copies". And, whatever may have impelled this Court to construe the naked word "copy" narrowly in *White,* no such consideration can obtain here in the construction of the phrase "to * * * perform * * * in any manner or by any method whatsoever". For, the Congressional mandate is plainly that "to perform" be most broadly construed, both as to what constitutes a performance, i.e., its "manner", and as to the means by which a performance is effected, i.e., the "method" employed.

Moreover, *White* was concerned solely with the copyright owner's exclusive right to "copy", and the Court noted, 209 U.S. at 16, that "There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such * * * music rolls when sold for use in public performance might be held as contributing infringers". Copying and performing are, manifestly, quite different matters, both conceptually and factually, although the Copyright Act gives the copyright owner the exclusive right to both. *Remick Music Corp.* v. *Interstate Hotel Co. of Nebraska,* 58 F. Supp. 523 (D. Neb. 1944), aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809 (1947). In *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411; 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court held that "nothing in *White-Smith Music Co.* v. *Apollo* * * * affects our conclusion", which was that a radio broadcast of a copyrighted work was a public performance of it.

Petitioner's efforts, Pet. B. 33-38, to undermine the authority and applicability of *Buck* ● *Jewell-La-*

Salle Realty Co., 283 U.S. 91 (1931) are wholly unavailing, for nothing petitioner advances diminishes one whit the force of its teaching, 283 U.S. at 198, that

> the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.

The force of *Buck* becomes even more compelling when it is recognized that it arose under section 1(e) of the Copyright Act, which, in granting the copyright owner the exclusive right publicly "to perform" his musical composition for profit, does *not* use the phrase "in any manner or by any method whatsoever", which appears in both sections 1(c) and 1(d), under which this case arises. The principle embraced by *Buck* does not depend on the minutiae of what was done there, and the Court below correctly held that "the technical means by which the result is produced are irrelevant". A 1356-57, fn. 9. Contrary to petitioner's view, Pet. B. 26, there is nothing "novel" in the holding of the Court below that petitioner performed the copyrighted works, for it does no more than apply in circumstances presented by a newer technology, the basic and well-settled legal principle applied by this Court in *Kalem*, on the advent of motion pictures, and in *Buck*, on that of radio.[9]

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[9] For similar applications of the principle, see: *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556; *Metro-Goldwyn-Mayer Distributing Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70, 76 (1st Cir. 1932); *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129, 134 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Edison* v. *Lubin*, 122 Fed. 240, 242 (3d Cir. 1903).

That the sounds and pictures of the broadcasts of the copyrighted motion pictures relayed and distributed by petitioner to its customers become audible and visible only when their customers "turn on" their television sets, Pet. B. 39, 40, is wholly irrelevant to a consideration of whether, when petitioner does what it does, it performs the motion pictures. For even in the case of the classical "live" performance of a dramatic work in the presence of a "live" audience in a theatre, the "pictures" and sounds made on the stage are visible and audible to members of the audience only when they "turn on" their eyes and ears, so to speak, to see and hear them. So, too, in the case of radio and television broadcasting—irrefutably performances—the sounds and pictures broadcast become audible and visible to the public only when they turn on their radio and television sets.

The petitioner utterly fails in its attempt, Pet. B. 43-52, to distinguish its own relaying and distribution of television broadcasts, from broadcasting itself. For, the fact remains that petitioner is engaged, for profit, in bringing to the commercial establishments and homes of its some 15,000 customers respondent's copyrighted motion pictures, to become audible and visible on television sets when turned on by somebody acting independently of petitioner. This is precisely what broadcasters do, and it can make no difference under the Copyright Act whether the electronic impulses achieving this result are transmitted over the air by a broadcaster, or are relayed and distributed by cable, as the petitioner does.

Nor is it, in this context, other than a distinction without a difference that broadcasters do the "planning, selecting and supervising" of programs, Pet. B.

48, while it serves petitioner's purpose to ride the broadcasters in "piggy back" fashion, and to relay and distribute to its customers the programs which result from the broadcasters' efforts. That petitioner thus spares itself the time, effort, and expense to which broadcasters necessarily go to arrange and acquire programs attractive to both advertisers and audiences manifestly affords no basis for concluding that the petitioner need pay no heed to the exclusive rights reserved by §§ 1(c) and 1(d) of the Copyright Act to the owners of the copyrights in the motion pictures included in the programs petitioner retransmits to its subscribers.

In any event, petitioner's premise is wholly untenable, for when it selects for relay and distribution the broadcasts of certain television stations rather than those of others, petitioner is, in a very real sense, selecting programs. The "CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) will be available on the system". *First Report and Order,* 38 FCC 683, 702 (1965). Indeed, the record here is replete with evidence of petitioner's preoccupation with "programming". E 99, 101, 102, 203, 206, 207, 216, 224; A 34, 35.

In rejecting a similar contention in *Buck,* this Court said, 283 U.S. at 198, 199:

> The defendant contends further that the acts of the hotel company were not a performance because * * * the operator of a radio receiving set cannot render at will a performance of any composition, but must accept whatever program is transmitted during the broadcasting period. * * * One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement

> merely because he does not select the particular program to be played. Similarly, *when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another.* [Emphasis supplied]

Petitioner grasps at a shadow and lets the substance escape when it urges, Pet. B. 45, 46, that a broadcasting station's admitted public performance is to be found, not in the broadcast but, rather, in the "live rendition" in the studio. Indeed, petitioner itself demonstrates the hollowness of this contention when it concedes, Pet. B. 47, that a broadcaster nevertheless performs when he "dispenses with the live performance in his studio and substitutes the playing of a record, tape or motion-picture film, or a program supplied to him * * * by a network". For, the District Court's finding, fully substantiated by the record, A 342-3, 366-8, 370-1, 943, and expressly adopted by the Court below, A 1354, text and fn. 7, is, A 73, 74:

> That plaintiff's copyrighted motion pictures are not visible or audible until they reach the subscriber's television sets emphasizes, rather than contradicts, the essential similarity between a CATV system and a broadcasting station and the dissimilarity between a CATV system and a home receiving set. Indeed, except in the comparatively rare instances where a broadcasting station has a live performance in its own studio, there is nothing visible or audible at the broadcasting station. Even when a broadcasting station originates programs by transducing motion picture films or videotapes into electromagnetic energy, there is nothing visible or audible to an observer at the station. The projection of the film in a television studio is on a small photosensitive surface within a camera tube. The fact that in CATV operations, as in

> the case of a broadcasting transmission, nothing is visible or audible in the process of transmission demonstrates the dissimiliarity between CATV and a home receiver, on the one hand, and the similarity between CATV and a broadcasting station, on the other.

(b) *Petitioner's performances of the copyrighted works were public performances.* Petitioner's argument, Pet. B. 39-43, that the "simultaneous viewing" by its customers of the broadcasts it relayed and distributed to them, if a performance, was not a public performance on its part, is based on a fundamental misconception of copyright law. The exclusive right granted to copyright owners by sections 1(c) and 1(d) is *to perform* their works in public, *not to view them.* Accordingly, *viewing* a public performance of copyrighted work does not infringe the copyright owner's exclusive right. This is true whether the viewers are members of a live audience in a theatre where a live performance is being given on the stage, or are in their own homes or business establishments watching television broadcasts received "off the air", or by means of petitioner's cable. Thus, that petitioner's customers do not infringe by watching the broadcasts petitioner relays and distributes to them, has no bearing on whether petitioner performs them publicly when it relays and distributes such broadcasts to its customers. The Court below was clearly correct in holding, A 1350, 1356, that

> * * * the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers—is fairly characterized as a public performance infringing the copyrights.

* * *

> * * * it seems clear to us that when * * * defendant * * * enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones.

Petitioner's concept of "multiplicity of private performances", Pet. B. 41, was advanced over forty years ago, in the early days of radio broadcasting, and was rejected in terms that have stood the test of time. Thus, in *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411, 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court said:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. *Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home.* Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. [Emphasis supplied.]

In *Messager* v. *British Broadcasting Company, Ltd.*, 138 L.T. 571, 572-3 (C.A. 1928), [1928] 1 K.B. 660 (C.A.) Mem., cited by this Court in *Buck*, 283 U.S. at 197, fn. 3, Lord Justice Scrutton said:

> * * * in the Court below they [i.e. the broadcasters] said—and I admire their courage in saying it—that though they were giving a performance to be heard by hundreds of thousands of people, it was not a public performance. As I say, I admire their courage in saying it.

> McCardie, J., who tried the case, found, as one would expect, that it was a public performance * * *.
>
> * * * in this Court their courage failed them, and very properly, if I may say so, they have not argued that intentionally to talk to 100,000 people is not a public performance * * *.

Mr. Justice McCardie had ruled, [1927] 2 K.B. 543, 548, 549:

> If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act.

Obviously, the performance to which Scrutton, L.J., and McCardie, J., were addressing themselves was the one directed by radio to "100,000 people", not, as petitioner claims, Pet. B. 46, the "live" performance in the "private studio", attended only by "officials and a few friends".

That the broadcaster is himself engaged in publicly performing the copyrighted motion picture when he broadcasts it, does not affect the character of petitioner's simultaneous retransmission of the broadcast to its thousands of customers, as itself being a public performance. Thus, in *Buck,* 283 U.S. 191, 197-198, this Court said:

> The defendant next urges that it did not perform because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the act circumscribes the meaning to be at-

> tributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. * * * No reason is suggested why there may not be more than one liability.

What this Court thus said is equally applicable here, although what petitioner has done was not possible before the development of CATV.

(c) *The Court below fashioned no "new doctrine of infringement by contribution", and devised no "new theory of contributory performance".* The "new doctrine of infringement by contribution" which petitioner perceives in the decision of the Court below, Pet. B. 39, is a mere play on words. Petitioner purports to find this new doctrine, Pet. B. 40, in the holding of the Court below, A 1353, 1354, that:

> Defendant appears to concede that, under *Jewell-LaSalle* and *SESAC*, its CATV systems would perform broadcast television programs if they furnished television sets to their subscribers; but it argues that the fact that they do not is conclusive. Given the ready availability of television sets from other sources, however, defendant's decision not to provide them is wholly outweighed by the magnitude of *its contribution* to the viewing of broadcast television programs by its subscribers, just as *SESAC* and (by implication) *Jewell-LaSalle* held that the fact that the hotels' guests individually made the actual decisions to turn on a program and to listen to it did not negate a per-

> formance, because the hotels had done so much to provide signals which could be made audible at will. [Emphasis supplied]

This, obviously is no doctrine of contributory infringement as petitioner claims, Pet. B. 40, but is, rather, merely an appraisal by the Court of the extent to which petitioner was responsible for having brought into the homes and commercial establishments of its 15,000, or so, paying customers, broadcasts of respondent's copyrighted motion pictures. The Court below made a similar appraisal in other language on the previous page, A 1352-53:

> Defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio programs for their guests.

Thus, the fanciful "new doctrine of infringement by contribution" is petitioner's doing, not that of the Court below.

The "new theory of contributory performance" which petitioner attributes to the Court below, Pet. B. 52, is equally fanciful. Neither the manufacturers and distributors of television sets and television antennas, nor the common carriers or public utilities to which petitioner refers, Pet. B. 53, receive broadcasts of respondent's copyrighted motion pictures, amplify and otherwise process them electronically, and then relay and distribute them for profit to television sets in the homes and commercial establishments of 15,000, or so, paying customers. This is not to say, however, that those who knowingly aid and abet petitioner, without any legal obligation to do so because of their public

callings, may not be liable as contributory infringers under the "standard doctrine" to which petitioner refers. Pet. B. 40. So far as concerns "master antennas", Pet. B. 54, it may be noted that petitioner's operations did not involve any such apparatus, and that no such question was considered below, A 642, 903, 904, or is now before this Court. In any event a CATV system, is not "simply a master T.V. antenna", *Second Report and Order,* 2 FCC 2d 725, 780 (1966).

The Solicitor General agrees, U.S. Mem. 2, that

> With respect to the basic question considered below, * * * the court of appeals was correct in deciding that the activities of the CATV systems constitute a "public performance" within the meaning of Sections 1(c) and 1(d) of the Copyright Act (17 U.S.C. 1(c), 1(d)).

II

BY LICENSING BROADCASTS OF ITS COPYRIGHTED MOTION PICTURES, RESPONDENT DID NOT, AS A MATTER OF COPYRIGHT LAW, LOSE ITS EXCLUSIVE RIGHT UNDER SECTIONS 1(c) AND 1(d) TO PERFORM THEM PUBLICLY AND PETITIONER INFRINGED SUCH RIGHT BY RETRANSMITTING THE BROADCASTS OF THEM WITHOUT RESPONDENT'S CONSENT.

(a) *A "license implied in law" is a contradiction in terms.* Respondent agrees with the view of the Solicitor General, U.S. Mem. 5, 6, in effect, that a "license implied in law" is a contradiction in terms. While the phrase may be a handy tag to describe consequences, it is, in and of itself, conceptually barren and devoid of substance. What is actually involved in petitioner's claim, Pet. B. 72-79, to a "license implied in law under

the Copyright Act", is whether, as a matter of law, when a copyright owner licenses a television station to broadcast his copyrighted work, the copyright owner thereby loses so much of his exclusive right to perform it publicly, that petitioner and others may freely receive such broadcast, and publicly perform it for their own gain. Petitioner points to no provision of the Copyright Act, and to no guiding precedent to support its contention, and, indeed, there is none.[10] U.S. Mem. 7, 8.

(b) *Making exceptions to unqualified statutory rights is a legislative function.* As the Solicitor General makes plain, U.S. Mem. 5, 7, 8, petitioner's claim to a "license implied in law" under the Copyright Act depends not on a construction of any of the provisions of the Act, but, rather on an exercise of "judicial flexibility" to the end that an exception to the exclusive right of copyright owners under sections 1(c) and 1(d). of the Act "be established in law by this Court". In refusing to take such action in like circumstances in *Buck,* 283 U.S. at 199, this Court emphasized that "the existing statute makes no such exception", and that writing an "exception" into the Act was wholly a legislative function. Similarly, in *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411,

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[10] The "implied" license, suggested in *Buck,* 283 U.S. at 199, fn. 5, as a "possibility" if the facts had been otherwise than they were in that case, was, clearly, a license implied in fact. *Society of European Stage Authors and Composers* v. *New York Hotel Statler Co.,* 19 F. Supp. 1, 6 (S.D.N.Y. 1937) *per* Woolsey, J. The qualified "compare" citation in *Buck, loc. cit. supra,* of *Buck* v. *Debaum,* 40 F. 2d 734 (S.D. Cal. 1929) would seem clearly to indicate something less, or other than acceptance. Petitioner's defense of "license implied in fact" is one of the issues which the District Court reserved for later trial and determination, and has yet to be tried. It was not before the Court below, and is not now before this Court. See pp. 3, 4, *supra.*

412 (6th Cir. 1925), cert. denied, 269 U.S. 556, the Court said:

> Bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights. The rights of composer, producer, performer, and the public under this new method of reproduction are eminently matters for considered legislation; but, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are, fairly construed, applicable to the new situation.

The cases applying the so-called "fair use" doctrine, suggested by the Solicitor General, U.S. Mem. 5, 8, as precedents for judicial "qualification"—i.e., whittling away—of the statutory rights of copyright owners, would appear, on analysis, as not involving "a development of the law along these lines". U.S. Mem. 16. Basically, what is involved in such cases is whether what was done, fairly considered, was to print, reprint, publish, copy or dramatize the copyright owner's work, etc., etc., within the meaning and purpose of section 1 of the Copyright Act, which reserves such rights exclusively to the copyright owner, or whether what was done amounted to something less, frequently to the point of *de minimis non curat lex*.[11]

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[11] See, e.g., *Dun* v. *Lumbermen's Credit Association*, 209 U.S. 20 (1908); *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. 833, 838 (2d Cir. 1910); *Mathews Conveyer Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73, 84, 85 (6th Cir. 1943); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306, 307 (2d Cir. 1966), cert. denied 385 U.S. 1009; *Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348, 350, 351, 353, 354 (S.D. Cal. 1955); *Cravens* v. *Retail Credit Men's Ass'n.*, 26 F. 2d 833, 834, 835 (M.D. Tenn. 1924).

The Solicitor General also suggests, U.S. Mem. 8, that "the same judicial flexibility in construing the Copyright Act which admits of its application to new developments in technology should similarly obtain" to create new limitations on the statutory rights of copyright owners based upon "considerations of public policy". But, "judicial flexibility" plays no part in the process of determining whether the Copyright Act applies to "new developments in technology", as *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908); Pet. B. 29-33; U.S. Mem. 7; *supra*, pp. 16-18, demonstrates. In making such determinations, courts "but decide whether and to what extent statutes covering the subject matter generally, but enacted without anticipation of such radical changes * * * are, fairly construed, applicable to the new situation", and leave to the Congress the consideration of what the "rights of composer, producer, performer, and the public" in the new circumstance *should* be. *Jerome H. Remick & Co.*, 5 F. 2d at 411, 412; *supra*, p. 30.[12]

The Solicitor General's reliance, U.S. Mem. 8, on *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932) would appear to be misplaced. There, the question, which this Court answered in the negative, was whether copyright was such a federal instrumentality as to immunize copyright royalties from a state gross receipt tax. In describing the relationship of the United States to copyright, this Court referred to copyright's constitu-

[12] That the provisions of sections 1(c) and 1(d) of the Copyright Act securing to copyright owners the exclusive right publicly to perform their works apply to "new developments in technology" is made plain by the statutory language, "in any manner or by any method whatsoever", used in those sections.

tional basis and statutory origin, and then continued, 286 U.S. at 127, 128:

> In creating this right, the Congress did not reserve to the United States any interests in the production itself, or in the copyright, or in the profits that may be derived from its use. * * * The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. * * * The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects".

The Court then emphasized, 286 U.S. at 130, that:

> Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants * * *.

While the Solicitor General suggests that this Court create a narrower exception, i.e., a "license implied in law" of more limited application, U.S. Mem. 9-16, than does petitioner, Pet. B. 72-79, neither petitioner nor the Solicitor General advances any sound or persuasive reason why this Court should carve *any* exception out of the exclusive performing rights expressly granted copyright owners, particularly in view of the overall revision of the Copyright Law which is cur-

rently pending in the Congress,[13] and to which the Solicitor General refers with particularity. U.S. Mem. 16, text and fn. 10.

(c) *That a copyright owner licenses another publicly to perform his work, does not "release" it to the public.* Petitioner's principal argument, Pet. B. 75-79, which the Solicitor General rejects, U.S. Mem. 9, is that in licensing television stations to broadcast its copyrighted motion pictures, respondent "released for reception by the public that broadcast", without limit, and "exhausted the monopoly so far as reception of that broadcast is concerned", so that "the public" has a "license implied in law to receive that broadcast off the air for private viewing by the use of equipment of its own choice—including reception aided by a CATV system such as petitioner's". This argument is based on two obvious fallacies.

First, petitioner misconceives the meaning of the terms "publicly" and "in public" in the context of §§ 1(c) and 1(d) of the Copyright Act. To license another to perform a copyrighted work "publicly", or "in public", is not to "release" it "to the public". It is rather, but to authorize the *licensee,* and no other,

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[13] H.R. 2512, 90th Cong., 1st Sess., which was passed by the House on April 11, 1967. See, 113 Cong. Rec. 43644-43647, April 6, 1967; id. 43857, April 11, 1967. S. 597, 90th Cong. 1st Sess., a companion bill to H.R. 2512 as originally introduced, is also pending. See, Memorandum of the United States—Motion to Postpone Oral Argument—filed herein December 12, 1967, pp. 3, 4. The so-called Kastenmeier Bill, section 111 of H.R. 2512, as brought to the floor of the House, U.S. Mem. 16, fn. 10, was deleted before H.R. 2512 was passed by the House. To say at this time, as the Solicitor General does, U.S. Mem. 16, fn. 10, that "legislation which eventuates may well follow" one "pattern" or another, is pure speculation.

to perform the work "in public", at the time and place, and in the manner specified in the license, and at no other time or place, or in any other manner. A 29, 30, 809-817; E 340-3. A license is merely a waiver, personal to the licensee, to the extent it provides, of the copyright owner's exclusive right to perform his work in public. Cf. *DeForest Radio Telephone & Telegraph Co.* v. *United States,* 273 U.S. 236, 242 (1927); *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 181 (1938); *Goldsmith* v. *C.I.R.,* 143 F. 2d 466, 467 (2d Cir. 1944), per L. Hand, J., cert. denied 323 U.S. 774.

Secondly, since the copyright owner's exclusive right is *to perform* his work publicly, and *not to view it,* it is a concept wholly alien to copyright that by licensing another publicly to perform his work, or otherwise, the copyright owner licenses the public, by implication of law or of fact, or otherwise, to view it. The copyright owner has no viewing rights to license, and it would be no less meaningless a gesture for the law to imply that the public has a license to view the broadcast work, than it would be for the copyright owner expressly to grant one. For, the public needs no license of the copyright owner *to view* a performance of his copyrighted work.

Thus, contrary to petitioner's understanding, Pet. B. 77, the viewing public, including petitioner's customers, are not infringers, not because the public has a license implied in law giving it a right to view the broadcast, but, rather, because viewing, as distinguished from performing, does not require a license. Accordingly, it proves too much to argue, as petitioner does, Pet. B. 77, that the public's "right" to receive the authorized broadcast "must protect petitioner,

whose CATV service is chosen by members of the public as their preferred means of enjoying their right to receive". For, if there is any validity to petitioner's contention, anyone could publicly perform a copyrighted work for profit, on the air, live or otherwise, without the copyright owner's consent, and yet not be an infringer because the members of the public constituting his audience did not infringe. An audience does not infringe even in watching an infringing performance. Petitioner's logic leads inevitably to the destruction of copyright as a system and a concept. Cf. U.S. Mem. 9.

Petitioner patently misconceives the policy of the Copyright Act as being crudely and cynically to lure a copyright owner to "release" his work "to the public", and that once it has been so "released" for any purpose, howsoever limited, it is, in effect, to be considered as being in the public domain, free to be used for profit by anybody. Pet. B. 58-62, 73-75. Cf. U.S. Mem. 9. Certainly, that is not what this Court meant, as petitioner seems to think, when it said in *U.S.* v. *Paramount Pictures,* 334 U.S. 131, 158 (1948) that the "reward" to the copyright owner is "a secondary consideration". For, as this Court made plain in *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement of individual effort by personal gain is the best way to advance public welfare* through the talents of authors and inventors in "Science and useful Arts". Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. [Emphasis supplied]

Indeed, the policy behind the Copyright Act is " 'to afford greater encouragement to the production of literary works * * * ' ", *Washingtonian Pub. Co., Inc.* v. *Pearson,* 306 U.S. 30, 36 (1939), and, as this Court emphasized in *Fox,* 286 U.S. at 130, *supra,* p. , the "advantage to the public" of copyright "is gained merely from the carrying out of the general policy in making such grants * * *".

If the policy of the Copyright Act were as petitioner contends, copyright would be in large measure self-defeating. It is, of course, no part of the judicial function to assure "copyright owners the highest possible profits", but, on the other hand, the Copyright Act is to be applied, consistent with its purpose, "to provide an atmosphere in which authors have a strong incentive to create and disseminate their works and are given the opportunity to obtain fair remuneration for the use of them". U.S. Mem. 6. While the measure of profit and fair remuneration is a function of the market, the inviolable rights of copyright owners have been prescribed by the Congress in the Act. In construing copyright statutes, which is the judicial function, this Court, in *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346 (1908), cautioned that they

> * * * ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, *nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.* [Emphasis supplied.]

This Court has made it unmistakably plain that the Copyright Act grants to the copyright owner the "exclusive right" not merely to one public performance, or any limited number of public performances, but "expressly" to "all public performances for profit" of his work during the term of the copyright, without limitation. *Buck,* 283 U.S. at 197. This, then, and nothing less or different, is the measure of the performing rights Congress intended to grant to copyright owners. *Irving Berlin, Inc.* v. *Daigle,* 31 F. 2d 832, 885 (5th Cir. 1929). Nevertheless, what both petitioner and the Solicitor General propose is that, by one device or another, this Court deprive copyright owners of the benefit of the full measure of the performing "rights the Congress intended to grant." Petitioner's proposed "license implied in law" is, of course, nothing other than a legal fiction to cloak what the Solicitor General so frankly proposes, the bald judicial creation of an exception to the performing rights of copyright owners as expressly provided by the Act. U.S. Mem. 5-8.

(d) *There is no analogy in the cases dealing with sales of chattels.* Neither *Aro,* 377 U.S. 476 (1964), on which both petitioner and the Solicitor General rely, Pet. B. 74-76, text and fns. 91, 93; U.S. Mem. 6, fn. 3, nor *Bobbs-Merrill,* 210 U.S. 339 (1908), on which petitioner relies, Pet. B. 74, 77, but which the Solicitor General dismisses as *not* "pertinent here", U.S. Mem. 5, text and fn. 2, affords any precedent, direct or by analogy, for this Court's embarking on any such course. The "implied license to use" to which this Court refers in *Aro,* 377 U.S. at 484, citing *Adams* v. *Burke,* 17 Wall.

453, Pet. B. 74, is, clearly, a license implied in fact, and not a so-called "license" implied in law.[14]

Nor is *Bobbs-Merrill,* 210 U.S. 339, based on any theory of license implied in law. On the contrary, the Court's holding there that a copyright owner who sold copies of his work could not limit the price at which purchasers from his vendee could resell them, was grounded, explicitly, on a construction of that provision

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[14] A patentee's right is, expressly, "to exclude others from making, *using,* or selling the invention" during the term of the patent. Tit. 35 U.S.C. § 154. Conversely, Tit. 35 U.S.C. § 271(a) provides that "whoever without authority makes, *uses* or sells any patented invention * * * infringes the patent". [Emphasis supplied.] In this circumstance, the sale by a patentee of an article embodying the invention ordinarily will give rise to an inference of fact that he thereby intended to authorize the purchaser *to use it.* For, unless it affirmatively appears otherwise, the natural inference is that he understood when he sold it, that the purchaser's purpose in buying the article was to use it. *Green* v. *Electric Vacuum Cleaner Co.,* 132 F. 2d 312, 314 (6th Cir. 1942), cert. dismissed 319 U.S. 777. The purchaser's right to repair the article, U.S. Mem. 6, fn. 3, is but a facet of his right to use it, i.e., "to preserve" its "fitness for use". *Aro,* 377 U.S. at 497. But, reconstruction, as distinguished from repair, constitutes an infringement. See *Aro* 377 U.S. at 479, 490. It is not clear what the Solicitor General means by his reference, *loc. cit. supra,* to "improvement". A purchaser of an article embodying a patented invention, can, as an incident to his right to use it, make minor improvements in it going to its usability. *Wilbur-Ellis Company* v. *Kuther,* 377 U.S. 422 (1964). But, an improver is not, as such, licensed to use the improved invention, and needs the consent of the patentee to use the elements constituting the original invention. *Temco Electric Motor Co.* v. *Apco Mfg. Co.,* 275 U.S. 319 (1928). Moreover, the purchaser's right to resell the patented articles is not based on an implied license, as the Solicitor General suggests, *loc. cit. supra,* but on a construction of the patent law that a patentee's exclusive right to control the sale of articles embodying his invention, is exhausted with respect to any one of such articles, when he sells it. *Bauer & Cie.* v. *O'Donnell,* 229 U.S. 1 (1913).

of the copyright statute granting copyright owners the right to make and vend copies of their works. 210 U.S. at 346, 350-351; Cf. *Bauer & Cie.* v. *O'Donnell,* 229 U.S. 1 (1913). At the same time, the Court cautioned, significantly, that although a purchaser of a copy was free to resell it, "he could not publish a new edition of it", *Bobbs-Merrill,* 210 U.S. at 350, obviously, because the copyright owner had not granted the purchaser a license to publish his work.

In any event in *Buck,* 283 U.S. at 197, this Court expressly rejected the analogy to *Bobbs-Merrill* for which petitioner contends, and held that the unlicensed retransmission to any segment of the public of a public performance by broadcast, is itself a public performance, *supra,* pp. 25, 26, and, accordingly, infringes the copyright owner's exclusive right to perform his work. In so holding, this Court said, 283 U.S. at 197:

> The argument here urged * * * is that, since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred, both that of making copies * * * and that of giving public performances for profit * * *; and that a monopoly of the reception for commercial purposes, of this same rendition, is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339. This *analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act,* * * *

but a monopoly is expressly granted for all public performances for profit. [Emphasis supplied][15]

(e) *Copyright owners may license others to exercise their exclusive rights at given places or within specified geographical areas.* No analogy or relevance is to be found in the principle on which petitioner relies, Pet. B. 74-77, fn. 91 at 75, fn. 95 at 77, that a patentee may not restrict the territory in which the vendee of a chattel embodying the invention may use or sell it. The principle rests squarely on a construction of the provisions of patent law granting patentees the exclusive right to vend or sell, and is not based on any theory of a "license" implied in law running to the purchaser. See, e.g., *U.S.* v. *General Electric Co.*, 272 U.S. 476, 489 (1926); *Keeler* v. *Standard Folding-Bed Co.*, 157 U.S. 659, 663 (1895); *Bauer & Cie.* v. *O'Donnell*, 229 U.S. 1, 16 (1913).

Here, however, there was no sale of any chattel as in the patent cases on which petitioner relies, or as was the case in *Bobbs-Merrill*, 210 U.S. 339, which espouses an identical principle under copyright law applicable to sales by copyright owners of chattels constituting copies of their works. Here the copyright owner *licensed* broadcasting stations publicly to per-

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[15] Petitioner's attempted explanation, Pet. B. 74, fn. 90, of the passage from *Buck* quoted above rests on a truncated quotation from elsewhere in that opinion, taken out of context. The point was not, as petitioner claims, that "the broadcast * * * had not been authorized by the copyright owner", as appears clearly from what the Court actually said, 283 U.S. at 198: that *"since the public reception for profit in itself constitutes an infringement*, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee". [Emphasis supplied].

form his works, and as is pointed out, *Adams* v. *Burke*, 17 Wall. 453, on which petitioner heavily relies, the rule there announced with respect to chattels *purchased* from the patentee or his licensee, was adopted, 17 Wall. at 456, 457, notwithstanding "Whatever * * * may be the rule when patentees divide territorially their patents, as to the exclusive right to make or sell within a limited territory * * *".[16] As was said in *Bloomer* v. *McQuewan*, 14 How. 539, 549 (1853), "The distinction is a plain one". And there is no question but that a patentee may lawfully *license* his patent rights, or some of them, for "* * * a *specific part* of the United States". *U.S.* v. *General Electric Co.*, 272 U.S. at 489. Nor has it ever heretofore been suggested that by licensing a public performance of a copyrighted work in one place, e.g., Pittsburgh, the copyright owner loses his exclusive right to other public performances of the work *in the same place, or in other places,* e.g., Clarksburg, W. Va., Los Angeles, or New York. Indeed, in *Manners* v. *Morosco*, 252 U.S. 317, 325 (1920) this Court recognized that a license to perform a copyrighted work publicly "within * * * territorial limits", reserves to the copyright owner his exclusive right to perform it publicly elsewhere. See also, *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208, 227, 228 (1939).

The horror petitioner expresses, Pet. B. 83, at the thought that the Court below should permit copyright owners "to erect their own 'areas or zones'" must be feigned. Licenses publicly to perform copyrighted

[16] Indeed, in *Adams*, as well as in *Keeler*, on which petitioner also relies, the patentee had granted licenses to make and vend to different licensees for different geographical areas, and the question, in effect, was whether the vendee of one licensee could use the article in the territory of the other.

works have historically and traditionally been limited "territorially" to a particular theater, or group of theaters, or to a particular community or region, and such licenses have, of course, been judicially enforced.[17] Clearly, in licensing public performances of a copyright work, it is the copyright owner's right to specify that the performances licensed may be given only "within the territorial limits stated" in the license. *Manners* v. *Morosco*, 252 U.S. at 325. Cf. *Second Report and Order*, 2 FCC 2d 725, 778 (1966), where the Federal Communications Commission said:

> A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area

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[17] See, e.g., *Metro-Goldwyn-Mayer Distributing Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); *Tiffany Productions* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931). Neither *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) nor *Brulotte*, 379 U.S. 29 (1964), Pet. B. 27, 77, fn. 95, support petitioner. In *Schwinn* it was held, under the antitrust laws, that a manufacturer and purchasers from him could not lawfully limit the persons to whom, or the geographical areas in which the products sold could be resold. On the other hand, *Schwinn* held that the manufacturer could put such limitations on sales by consignees who acquired no title to the products. Thus, if *Schwinn* has any relevance here, it supports respondent, for a license is not a "sale", being "no more than 'a mere waiver of the right to sue' ". *General Talking Picture Corp.*, 304 U.S. at 181. The holding of *Brulotte* is that since the patentee's right is to exclude others from making, selling or using the invention during the term of the patent, he may not charge royalties for the use of an article incorporating the patented invention, after the term of the patent had expired. Here, the continuing validity of respondent's copyrights at the times when petitioner received broadcasts of them, and relayed and distributed them by cable to its 15,000, or so, paying customers, is not open to question, Pet. B. 5.

and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process * * *.

(f) *In publicly performing copyrighted works by relaying and distributing broadcasts of them, CATV is not doing what the public has a right to do.* The analogy of the patent cases is wholly inapplicable here because the patentee's exclusive right is to *make, use and sell* his invention. see fn. 14, *supra,* p. 38, while the copyright owner's exclusive right with which this case is concerned, is *publicly to perform* his work. Thus, in the patent cases, those who purchase articles embodying the invention from the patentee or under his authority, i.e., the public, are themselves licensed *to use* the invention by or under authority of the patentee. The copyright owner, however, licenses only theatrical producers, moving picture theatres, television stations, and the like, *publicly to perform* his work, and the public, is *not* licensed by the copyright owner, for the plain reason that the Copyright Act reserves to the copyright owner no rights with respect to watching or hearing a performance of his work.

Significant consequences flow from this difference. Thus, as in *Aro*, 377 U.S. 476, a third party does not infringe a patent if, without the consent of the patentee, he does for authorized users of the patent, i.e., the

public, what they themselves could do under their licenses to use. On the other hand, one who like petitioner, without the consent of the copyright owner, receives a broadcast of a copyrighted work, and relays it to members of the public who are its customers, is not, as petitioner claims, Pet. B. 77, doing for such members of the public what they are licensed to do for themselves. For the public certainly has no license publicly to perform the copyrighted work in the manner petitioner performs it, or any other. Thus, contrary to petitioner's views, Pet. B. 76, fn. 93, 77, the discussion in Part II of *Aro*, 377 U.S. at 493-500, does not support petitioner's contention here for a "license" implied in law.

(g) *One royalty for each public performance for profit of his work is the copyright owner's lawful due.* Petitioner strangely pleads, Pet. B. 76, fn. 93, for the application here of the principle so pithily stated by Mr. Justice Black in the first *Aro* case, 365 U.S. 336, 360: "One royalty to one patentee for one sale * * *". For that, precisely, is what respondent is contending for. Respondent does not deal in chattels, but, rather, in the right publicly to perform its works, and its "sales" are of licenses authorizing others so to perform them. Respondent licensed the broadcasting stations to perform its works, and received a royalty for each performance by broadcast. Petitioner also performed respondent's works publicly for profit, but claims that no recompense is owing respondent because respondent was paid by the broadcasting station, and that any payment by petitioner would be a "second license fee", Pet. B. 78. But each performance, like each sale, is entitled to one royalty, and petitioner's performance stands on its own feet as a public performance separate

and apart from the broadcast of the television station it receives and retransmits for profit to its customers. *Buck,* 283 U.S. at 197, 198; *Society of European Stage Authors and Composers* v. *New York Hotel Statler,* 19 F. Supp. 1-6 (S.D.N.Y. 1937), per Woolsey, J.[18] Thus, in *Buck,* 283 U.S. at 198, this Court said:

> * * * nothing in the act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. * * * *No reason is suggested why there may not be more than one liability.* [Emphasis supplied.]

(h) *A non-statutory exception to the statutory rights of copyright owners cannot be based on speculation as to possible future "anticompetitive consequences".* Petitioner contends, Pet. B. 62-67, that immunity from liability for infringement for operations such as its own, should be read into the Copyright Act because of "anticompetitive consequences" that might other-

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[18] Petitioner suggests, Pet. B. 78, text and fn. 97, that if it has to pay a fee to respondent, it will pass it on to its customers, who have already "shared in the payment of the first fee, since the public pays for television programs indirectly by buying the products and services of advertisers". But, while advertising costs of all kinds are an element of the price of a product, such costs are borne not by television viewers, or magazine readers, as such, for example, but by the whole generality of consumers, whether or not they are reached by any particular advertising media or none. Accordingly, it is highly speculative whether, and, if so, to what extent petitioner's customers have "shared in the payment" of the fee paid by the broadcasting station.

wise result. See also, U.S. Mem. 7, fn. 4. But petitioner's reliance on the *ex parte* statement, Pet. B. 63, 64, before a Senate subcommittee of a Department of Justice officer is misplaced. Mr. Zimmerman, who normally serves as "first assistant" in the Department's Antitrust Division, was not speaking to the Copyright Act, but was, rather, addressing himself to a Copyright Law Revision Bill [19] which recognized CATV liability for copyright infringement, and was urging that the Bill be amended expressly to exempt CATV from all, or practically all, such liability.[20] Given his way, the Congress would legislate out of existence, at least so far as concerns CATV, the "monopoly * * * expressly granted of all public performances for profit". *Buck,* 283 U.S. at 197. While the considerations put forward by Mr. Zimmerman may possibly be matters into the merits of which the Congress may wish to look in deliberating proposed legislation, they are utterly irrelevant to the application of existing law. See, *Jerome H. Remick,* 5 F. 2d at 411, 412, quoted *supra,* p. .

That, like all other rights, copyright may be subject to abuse or misuse, is no ground for applying the Copyright Act "so narrowly * * * as to deprive those entitled to their benefit of the rights Congress intended

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[19] S. 1006, 89th Cong., 1st Sess., 1965.

[20] Mr. Zimmerman's statement appears in full in *Copyright Law Revision—CATV,* Hearings on S. 1006, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4, and 25, 1966, at pp. 211-219. Mr. Zimmerman's basic misconceptions concerning the nature of copyright, and of CATV and television operations, are succinctly pointed out in the statement of Herman Finkelstein, general counsel of the American Society of Composers, Authors and Publishers, *ibid.*, pp. 230 *et seq.*

to grant". *Bobbs-Merrill,* 210 U.S. at 346. For, there are ready means of dealing with such misuse or abuse if, and when they occur or are threatened, and the mere possibility that an innocent right may be abused or misused, is no ground to curtail or destroy it, by construing it away, or otherwise. Thus, the Congress has endowed the antitrust laws with a variety of sanctions, and a whole arsenal of means of enforcement, fully adequate to prevent violations when they are threatened, and to redress them, and punish violators, when they occur. The law is sufficiently versatile to deal adequately with anticompetitive acts threatened or effected through the instrumentality of copyright. See e.g., *U.S.* v. *Loew's, Incorporated,* 371 U.S. 38 (1962); *U.S.* v. *Paramount Pictures,* 334 U.S. 131 (1948); *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 105, 106 (2d Cir. 1951); *Second Report and Order,* 2 FCC 2d at 778. There is no need, nor would it be appropriate to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade. Cf. U.S. Mem. 9. *Morton Salt Co.,* 314 U.S. 488 (1942), Pet. B. 67. but illustrates the application of such sanctions in the case of the misuse of a patent. *Sears, Roebuck & Co.,* 376 U.S. 225 (1964), *ibid.,* is utterly irrelevant holding that "unfair competition" protection, tantamount to that accorded a patented invention or a copyrighted work, cannot be extended to a design not entitled to protection under either the patent or copyright laws.

While the question of damages is an issue which the District Court has reserved for later trial and determination, A 174; Pet. B., fn. 4, and, accordingly, is not involved on this review, some reference to it may never-

theless be appropriate in view of the suggestion that if the decision of the Court below is permitted to stand, huge amounts of damages for infringement would be assessable against petitioner and others similarly engaged in retransmitting for profit broadcasts of copyrighted works without the consent of the copyright owners.[21]

Wholly apart from anything else, there may be considerable doubt whether the method used in calculating the possible damages does not exaggerate them many fold.[22] Even then, the possible consequences of infringement could, and should have been taken into account by petitioner and others who commercially retransmit broadcasts of copyrighted works, when they first embarked, and then continued on their course despite the notice implicit in the commencement of this action in June 1960. Nevertheless, copyright owners such as respondent are engaged in the business of exploiting their copyrights, not suppressing them. Accordingly, they look upon petitioner's industry as, potentially, a very substantial customer for their programs, and are very much aware that it would hardly be in their best interests to endanger this source of business, whatever their rights, *strictissimi juris,* may

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[21] See brief herein of National Cable Television Association, Inc., *amicus curiae,* 20, text and fn. 36; Pet. B. 4, 5.

[22] See, e.g., *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.,* 344 U.S. 228 (1952); *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 309 U.S. 390 (1940); *Davilla* v. *Brunswick-Balke Collender Co. of New York,* 94 F. 2d 567, 569, 570 (2d Cir. 1938); *Washingtonian Pub. Co., Inc.* v. *Pearson,* 140 F. 2d 465 (D.C. Cir. 1944); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.,* 367 F. 2d 236, 240 (9th Cir. 1966) modifying in other respects, *Shapiro, Bernstein & Co.* v. *Bleeker,* 224 F. Supp. 595 (S.D. Cal. 1963), and 243 F. Supp. 999 (S.D. Cal. 1965); *Woodman* v. *Lydiard-Peterson Co.* 192 F. Supp. 67, 71 (D. Minn. 1912); *Davis* v. *E. I. DuPont de Nemours & Company,* 249 F. Supp. 329 (S.D.N.Y. 1966).

be. This is evidenced, if by nothing else, by their voluntary agreement, now in effect, not to sue commercial retransmitters of broadcasts of copyrighted works for infringement, so long as current mutual efforts to reach contractual arrangements, and to resolve differences over proposed amendments to the Copyright Law Revision Bill, continue.[23]

In any event, in view of the three-year statute of limitations, Copyright Act, § 115(b), petitioner's and its industry's potential liability for their intransigence is substantially less than it would have been, had copyright owners not been more disposed to arriving at contractual arrangements than to litigate. For, in addition to this action, so far as respondent has been able to ascertain, only one action has been commenced against a commercial retransmitter for copyright infringement.[24] The fears for petitioner's industry, if the decision below stands, are groundless.

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[23] See, Extension of Duration of Copyright Protection in Certain Cases, 113 Cong. Rec. S14067, October 3, 1967, remarks of Hon. John L. McClellan.

[24] *Columbia Broadcasting System* v. *Teleprompter Corporation*, Civil Action No. 64-3814, U.S. District Court for the Southern District of New York. This action is still pending. In this connection it should be noted that the quotation from the CBS Press Release of December 11, 1964, Pet. B., fn. 78, at 64, is taken out of context, and so abbreviated as to be misleading. The complete passage in the press release is:

> Finally, should CATV retransmission of network programming force stations off the air in some communities, the present system of nationwide program distribution by the television networks through their affiliated stations could break down; the quality of television service in this country could be impaired; and the availability of such service would be diminished. Network programs could become unavailable to persons in sparsely settled and rural areas not reached by CATV and some communities could lose their local programming service.

The difficulties which petitioner purports to foresee, Pet. B. 65, 66, in the negotiation of licenses, etc., are palpable bogeys, for copyright owners are in the business of exploiting their works and subsist by licensing others to perform them publicly; and it cannot reasonably be assumed that with prospective royalties as their incentive, copyright owners would permit any such difficulties, if they should arise, to go unresolved. That they may be unresolved up to now, is directly attributable to the adamant and concerted refusal of CATV operators to recognize copyright, and the consequent futility of undertaking unilaterally to resolve hypothetical problems, academically and *in vacuo*. Certainly, in any event, the prospective "difficulties" petitioner divines are not of such a character as to impel the adoption of any such concept as the license implied in law for which petitioner contends. Cf. U.S. Mem. 9, 17.

There is no basis for holding, as petitioner contends, that by licensing its copyrighted works for broadcast, respondent loses its exclusive right publicly to perform them to such extent that petitioner and others are free to pick up the broadcasts, and, without respondent's consent, to retransmit them for profit to members of the public anywhere. With respect to this contention, the Solicitor General has concluded, U.S. Mem. 9:

> Implication of a license in all circumstances would be tantamount to holding that once a copyrighted work was licensed to anyone it was irrevocably and entirely committed to the public domain. There seems to be no basis for such an implication, and it would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy. In addition, it would be

inconsistent with sound regulation of the nation's television resources, as expressed in the channel-allocation plan devised by the Federal Communications Commission pursuant to the specific congressional mandate to maximize television service through the extensive use of local stations.[6]

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[6] See the F.C.C.'s Sixth Report and Order, 17 Fed. Reg. 3905. Reference should also be made to the congressional policy favoring the development of UHF stations which, the Commission noted in its Second Report and Order, 31 Fed. Reg. 4540, were likely to suffer significantly from the unrestrained growth of CATV in metropolitan areas. In large part this difficulty stemmed, in the Commission's view, from the fact that CATV systems, unlike broadcasters, have not paid for programming which they provide, resulting in a situation of unfair competition between CATVs and independent and UHF stations.[25]

In principle, however, there can be no difference between the broad exception, by way of an implied license in law, or otherwise, for which petitioner contends, and the narrower exception which the Solicitor General proposes.

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[25] Consideration of the Communications Act and regulation of the Federal Communications Commission thereunder is reserved for point III, p. 52, *infra*.

III

NEITHER THE COMMUNICATIONS ACT NOR ANY POLICY THEREOF OR THEREUNDER HAS BY IMPLICATION REPEALED OR AMENDED OR OTHERWISE CREATED AN EXCEPTION TO SO MUCH OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT AS GRANT TO THE OWNER OF THE COPYRIGHT IN A MOTION PICTURE THE EXCLUSIVE RIGHT TO PERFORM IT PUBLICLY, THAT WHEN THE COPYRIGHT OWNER HAS LICENSED ITS BROADCAST BY A TELEVISION STATION, PETITIONER MAY, WITHOUT THE COPYRIGHT OWNER'S CONSENT, PERFORM IT PUBLICLY BY RETRANSMITTING THE BROADCAST WITHIN THE THEORETICALLY PREDICTED BOUNDARY OF THE WIDEST SERVICE AREA OF SUCH TELEVISION STATION—ITS SO-CALLED GRADE B CONTOUR—OR ELSEWHERE.

(a) *The Solicitor General's proposal, and petitioner's contention.* Under sections 1(c) and 1(d) of the Copyright Act, a copyright owner is "expressly granted" exclusive rights to "all public performances for profit" of his work. *Buck*, 283 U.S. at 197. Yet, the Solicitor General proposes, U.S. Mem. 9-16, and petitioner urges, Pet. B. 94-100, as an alternative to his broader contention, that when a copyright owner licenses a television station to broadcast his work, he loses his exclusive right to *all* public performances of it to the extent that others may, without his consent, publicly perform it for profit by receiving the broadcast and relaying and distributing it to members of the public, providing such retransmission is limited to the area within the broadcast station's Grade B contour—its widest theoretically predicted service area calculated under regulations of the Federal Communications Commission.

Petitioner's contention, Pet. B. 94-100, is that this derives from some impact on the Copyright Act of the

Communications Act, or its "policies", the effect of which is to create an exception, at least to the extent indicated, to the exclusive right of copyright owners. The Solicitor General, on the other hand, looks to the exercise of "judicial flexibility" to create such an exception, to the extent indicated, but no broader, in order to achieve "a substantial coalescence of communications and copyright policy with regard to CATV". U.S. Mem. 5, 8, 16. But, "copyright policy with regard to CATV" is no different than copyright policy with respect to any other manner or method of performing copyright works publicly for profit, for the Copyright Act expressly reserves to copyright owners the exclusive right "to perform" their copyrighted works "in public for profit * * * in any manner or by any method whatsoever". Thus, what the Solicitor General is, in fact, proposing is a "compromise", without precedent or warrant in law, which would sacrifice the plain right of copyright owners to "communications policy".

(b) *The "communications policy with regard to CATV" is expressly subordinate to, and wholly consistent with copyright.* The only "communications * * * policy with regard to CATV" is to lessen CATV's competitive advantage over broadcasters, which arises because broadcasters pay for their programs, while CATV neither pays for its programs nor honors the exclusive rights of broadcasters to programs under their licenses from copyright owners. This policy reflects the Federal Communications Commission's concern with the adverse consequences for television broadcast service of the adamant insistence of entepreneurs like petitioner that copyright owners have no rights which they are bound to respect. The

Commission has made it clarion clear that it found it necessary in the public interest to adopt its "carriage requirement"—the very rule on which petitioner would rely for immunity from copyright—and its related "non-duplication" and "distant signal" rules, "to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential". *Second Report and Order,* 2 FCC 2d 725, 736 (1966). That risk the Commission found in the unfair competition between CATV and broadcasting, in that broadcasters pay for their programs, while "CATV carries them without paying anyone * * *" for them. *First Report and Order,* 38 FCC 683, 703-706 (1965); *Second Report and Order,* 2 FCC 2d at 778-781. Underlying this anomaly, and "central" to the Commission's "evaluation of the nature and effects of competition between CATV and television broadcasting" is "the present inability of program suppliers to control the availability of their programs via CATV", due to the refusal of CATV to recognize copyright. *First Report and Order,* 38 FCC at 740; fn. 32 at 704; See also, *Second Report and Order,* 2 FCC 2d at 768. The Commission observed, 38 FCC at 702 that:

> "When a cable [i.e., CATV] system brings to a [broadcasting] station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

Furthermore, the Commission observed, 38 FCC at 702, 703, the "competition between CATV systems and [broadcasting] stations" is marked by a feature "not

present in the ordinary competition between broadcasting stations":

> * * * the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air reception and cable reception. * * * A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station.

In short, the Commission found, 38 FCC at 704, 705, and reaffirmed in *Second Report and Order,* 2 FCC 2d at 778-781, that:

> The * * * situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations—duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those programs without effectively outbidding the local station in the program market. * * * CATV, however, carries them without paying anyone or engaging in any bidding process. From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.
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> * * *

> In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition.

This "competition", the Commission noted, 38 FCC at 700, 701

> * * * is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.
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> * * * In dealing with competition between broadcasters * * * "* * * The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." * * * But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service".

The Commission took note of the case here at bar, 38 FCC at 704, fn. 32, and said:

> We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

The Commission struck at the very root of the matter when it said, 38 FCC at 706:

> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary

> service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.

In sum, it is clear that the root of the evil that threatened the public interest objective of the Federal Communications Act to encourage "a multiplicity of local station outlets", *First Report and Order,* 38 FCC at 700, and to frustrate its achievement sufficiently to impel the Federal Communications Commission to adopt its "carriage requirement" and its related "nonduplication" and "distant signal" rules, was the adamant refusal, which still persists, of CATV operators, including petitioner, to recognize copyright. See, *passim First Report and Order,* 38 FCC 683-746 (1965). *Second Report and Order,* 2 FCC 2d, 725-808 (1966).

Patently, "communications policy" with regard to CATV, as manifested by the regulations promulgated by the Federal Communications Commission—and there is no other—is grounded on no communications need, and has no purpose other than to remedy the unhealthy consequences of the inability, up to now, of copyright owners to enforce copyright policy with regard to CATV. As the Federal Communications Commission has made clear, the "communications policy with regard to CATV" which it has announced is wholly subordinate to copyright policy. Thus, in reaffirming, and extending the applicability of its "carriage requirement" the Commission said, *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966):

> * * * our decision is not intended to affect in any way the pending copyright suits, involving as they

> do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. * * * the fact that we have given the local station the right to have its signal carried over the CATV system * * * affords no defense to that system in a copyright suit. The station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). * * * In short, if the copyright suits are decided adverse to the CATV industry, we may * * * have to revise our rules.

The Commission has, indeed, gone so far to leave no room for doubt that its "carriage requirement" is subordinate to copyright as to caution television stations "to take into account the effect of any copyright decision in making requests for carriage under the present rules". *Second Report and Order,* 2 FCC 2d 725, 769, fn. 51a. And when CATV systems argued the converse to the argument made here, i.e., that its "carriage requirement" should be rescinded because of the decision of the District Court in this very case, the Commission replied, *Memorandum Opinion and Order,* 6 FCC 2d 309, 314 (1967):

> Finally, * * * we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case * * * systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated * * * our rules are based on the present situation in which the CATV system operates without regard to copyright clearance. * * * As to the above argument, the short answer

> is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. * * *

Accordingly, it is *not* true to say, as petitioner does, Pet. B. 71, that "the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage". And, more importantly, there is clearly no divergence between "communications and copyright policy with regard to CATV" that calls for any "coalescence", as the Solicitor General claims. U.S. Mem. 16. The Solicitor General and petitioner would have this Court give primacy over copyright policy, made plain by the Congress in the Copyright Act, to a communications policy, avowedly subordinate to it, which the Federal Communications Commission adopted solely to alleviate the evils resulting from the nonenforcement of the very rights of copyright owners that the decision of the Court below would enforce.

(c) *The economic realities demonstrate that CATV carriage of broadcasts of a television station within its Grade B contour will have a substantial adverse effect on copyright owners.* While rejecting petitioner's contention for a broad "license" implied in law which would permit it and others engaged in the same business, without the copyright owner's consent, publicly

to perform his copyrighted works by receiving broadcasts of them, and relaying and distributing them anywhere, as being "inconsistent * * * with the terms of the statute * * * existing precedents * * * sound policy [and] sound regulation of the nation's television resources * * *", U.S. Mem. 9, the Solicitor General invokes, U.S. Mem. 6, 7, in support of its no less topsy-turvy position, the same irrelevant specter of conjectural anticompetitive or monopolistic consequences dealt with above, pp. 45-50, *supra,* as petitioner, and then opines that the "economic realities of the broadcasting industry suggest the appropriateness of implying a more limited license for CATV activities". U.S. Mem. 9, 10. And, petitioner, too, appeals to such "economic realities", in support of this, its alternative or secondary contention for a more limited "license" implied in law. Pet. B. 90-94. But what are here involved are not the "economic realities", so-called, of the television industry, but the exclusive right of copyright owners publicly to perform their works for profit, expressly reserved to them by the Copyright Act. It is a strange, and a dangerous doctrine that preaches that an act of Congress may be held to be in part repealed or modified, wholly without reference to any Congressional intention or action in that regard. See *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 223. (1917), dissent of Mr. Justice Holmes; *Commissioner* v. *Beck's Estate,* 129 F. 2d 243, 245, 246 (2d Cir. 1942). In principle, the Solicitor General's proposal—petitioner's alternative—does not differ from petitioner's primary contention. They differ only in the *extent* to which the Copyright Act would be rewritten wholly without the mandate or the sanction of the Congress.

Even assuming, *arguendo,* that this might be done on the basis of "the economic realities of the broad-

casting industry", the record here is barren of any evidence as to what those "realities" are. Some of the Solicitor General's *a priori* assumptions in this regard, U.S. Mem. 10, 11, would appear to be non-controversial. Others, however, would seem to be ambiguous, speculative or contrary to respondent's experience or understanding. Moreover, although in rejecting petitioner's contention for a "license" implied in law the Court below "assumed" the "accuracy" of certain evidence offered by petitioner with respect to such matters, but not admitted by the District Court, A 1313-1327, 1360, 1361; Pet. B. 15, 16, 92, 93, the fact remains that such evidence is not included in the record, and that because it was not admitted, its truth has not been subjected to any of the prophylactic procedures of adversary litigation. In assuming its accuracy, while at the same time rejecting the contention it was intended to support, the Court below necessarily concurred in the District Court's conclusion that the proffered evidence was irrelevant. There has been no showing, moreover, that it would have established as fact any of the allegations it was intended to prove, and while "assuming" for the purpose indicated, that it would have, the Court below observed, significantly, that "at least" in certain respects, that seemed "debatable". A 1360, 1361.

The Solicitor General relies on so-called "economic realities" which, he says, indicate that the limited exception he proposes will bring about a situation in which "it might be expected that copyright owners can obtain greater royalties for the performance of their works", U.S. Mem. 10, and yet, he concludes, curiously, that the proposed limited exception "cannot be expected to have a substantial adverse impact on the incentive to create". U.S. Mem. 11. Whatever the

Solicitor General may mean, the error of his premises is clear.

First, the royalty for a license to broadcast a copyrighted motion picture is *not* calculated on the basis of the size of the television station's audience, or the amount of its advertising revenues. The licensing of films to television stations is a highly competitive business, and royalties are determined by the supply of, and demand for films of like quality in the market where the licensee broadcasts. Of course, more affluent stations in the more populous areas can, and may pay more for a license than less affluent stations in the less populous areas.

Secondly, CATV carriage of a "local" station's broadcasts, will not increase the station's audience in its *actual* service area, where it will merely tend to lessen the fragmentation of the station's audience by CATV's introduction into the area of broadcasts which could not otherwise be received there. Obviously, CATV's paying patrons become such not to get the "local" station which they can get off the air, but to get other stations whose broadcasts are not available to them off the air.

Thirdly, if CATV carries broadcasts of a television station to places within the station's Grade B contour, but where such broadcasts cannot be received off the air, CATV does, of course, increase the station's audience. But, the increase may be relatively so small in relation to the station's basic audience as to have no impact on its advertising revenues. Thus, here, CATV carriage of the Pittsburgh stations within whose Grade B contour any part of the Clarksburg-Fairmont area lies, increased by 15,000, or so, at most, the more than a million homes those stations reach without CATV

retransmission. On the other hand, the 15,000, or so, homes which petitioner reaches, comprise over 70 percent of the occupied dwellings in the Clarksburg-Fairmont area. Obviously, the effect of bringing the Pittsburgh broadcasts into the Clarksburg-Fairmont area, has a substantial adverse effect on the two local stations operating there, whose broadcasts can be received off the air. The situation is, in fact, no different than if those parts of the Clarksburg-Fairmont area were outside, rather than within the Grade B contour of the Pittsburgh stations. The consequence for copyright owners is similarly adverse because the market value of a film for broadcasting in any area is lessened when the film has already been shown by broadcast or CATV in the area. Thus, films licensed to Pittsburgh stations, and brought into the Clarksburg-Fairmont area by CATV, will for that reason bring less in royalties from the Clarksburg and Weston stations if, indeed, they will want them at all.

Fourthly, there is no reason to believe that CATV may not delete the advertising from the broadcasts it retransmits, and itself sell advertising. There has been some trend in this direction, and developments along these lines may be expected to accelerate in the future. CATV is not in business to make money for broadcasting stations, and if there are advertising revenues which can be gotten on the basis of CATV's audiences, CATV will see to it that it, and not the broadcasting stations get that revenue.

Finally, CATV can, and some systems do originate some of their own programs. In that connection, they are licensees of copyright owners, and pay royalties as any other licensees. To the extent, however, that CATV may be permitted to take broadcasts of copy-

righted works off the air and retransmit them without the copyright owners' consent, CATV's incentive to originate is lessened, and a market for copyrighted works which should be growing, is stultified.

Quite clearly, the "economic realities" point unmistakably to the Solicitor General's proposal, and petitioner's alternative contention, as being "appropriate" only in some never-never land, in the world of make-believe. If adopted, copyright owners can reasonably be expected to suffer serious adverse consequences.

(d) *The Communications Act and the Copyright Act deal with wholly different subjects on different planes. They are not in pari materia, and the Communications Act neither expressly nor impliedly repeals or amends any provision of the Copyright Act, and the Congress did not intend it to do so.* The Communications Act has no such impact on the Copyright Act as to create the exception to the exclusive right of copyright owners "to all public performances for profit" of their works, *Buck,* 283 U.S. at 197, which the Solicitor General suggests, and petitioner urges. The Copyright Act defines and delimits the rights of copyright owners in respect of their copyrighted works, and functions to establish a framework for the exploitation of copyrighted works in "an atmosphere in which authors have a strong incentive to create and disseminate their works". U.S. Mem. 6. Copyright "is a right exercised by the owner * * * at his pleasure and exclusively for his own profit * * *". *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 130 (1932), U.S. Mem. 8. The Communications Act, on the other hand, establishes a system for governing "interstate and foreign communications by

wire or radio, and all interstate and foreign transmission of energy by radio * * * and * * * all persons engaged * * * in such communication or such transmission * * * and * * * the licensing and regulating of all radio stations * * *". Communications Act § 2, Tit. 47 U.S.C. § 152, *infra*, p. 2 a. Clearly, the two statutes deal with entirely different subjects on entirely different planes. They are, on the face of it, neither consistent nor inconsistent with each other; they are entirely nontangential.

The Copyright Act and the Federal Communications Act are, thus, clearly not in *pari materia*,[26] and neither the Solicitor General nor petitioner points, or can point to any provision of the Communications Act which expressly repeals or amends sections 1(c) and 1(d) of the Copyright Act in any respect, or to anything in the legislative history of the Communications Act, or elsewhere, indicating that the Congress had any purpose or intention that it do so. Plainly, then, if the result proposed by the Solicitor General, and contended for by petitioner, is achievable, it can only be because the Communications Act has by implication repealed so much of sections 1(c) and 1(d) of the Copyright Act as to create an exception for public performances by CATV. But "repeals by implication are not favored", *U.S.* v. *Jackson*, 302 U.S. 628, 631 (1938), and a repeal or modification of a statute by a later statute will not be implied unless the two are in irreconcilable conflict, *Red Rock* v. *Henry*, 106 U.S. 596 (1883), or the later statute "necessarily destroys" the earlier one, *Wilmot* v. *Mudge*, 103 U.S. 217, 221 (1881),

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[26] Accordingly, *Allen Bradley Co.*, 325 U.S. 797 (1945); *Hutcheson*, 312 U.S. 219 (1941) and *Pan American*, 371 U.S. 296 (1963), Pet. B. 68, are inapplicable here.

or there is "positive repugnancy" between the two. *Wood* v. *U.S.*, 41 U.S. 342, 362-63 (1842). See also, *Posadas* v. *National City Bank*, 296 U.S. 497, 503, 504 (1936); *General Motors Acceptance Corp.* v. *U.S.*, 286 U.S. 49, 61, 62 (1932). The Communications Act patently has no such impact on the Copyright Act.

Persons engaged in communication subject to the Communications Act, and copyright owners cross paths only when the former communicate, or wish to communicate works of the latter "by wire or radio". Obviously, in effecting the effusion of communications of copyrighted works, or other pictures or sounds, persons engaged in "wire or radio" communication subject to the Act, are governed by it. Equally obviously, however, as the Federal Communications Commission has made plain, whether and under what circumstances persons so engaged have, or may acquire the right to communicate copyrighted works, is governed not by the Communications Act, but by the Copyright Act, which alone is the measure of rights pertaining to such works. *Report on Amendment of Rebroadcasting Rules,* 1 (part 3), Pike and Fischer R.R. 91:1131, 1134, 1139 (1952).

Under the Copyright Act, copyright owners have the exclusive right to perform their works publicly for profit, in any manner or by any method whatsoever. Nothing in either the Communications Act, or the Copyright Act expressly or impliedly impinges on that right, and no regulation of the Federal Communications Commission, as the Commission itself has expressly recognized, can serve as a substitute for the copyright owner's consent that his work be performed by another in public and for profit. *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966); pp. 57, 58, *supra.*

(e). *The "right" to receive broadcasts, if there is such a "right", does not import any right to retransmit broadcasts of copyrighted works to the public for profit, without the copyright owner's consent.* Petitioner argues, Pet. B. 79-84, that the Communications Act gives "the public" the "right" to receive television broadcasts, and that petitioner's retransmissions of broadcasts of copyrighted works to its paying customers, members of the public, is encompassed by such "right".

However, the obligation of a licensed television station, specifically, to "render such broadcasting service as will serve public interest, convenience or necessity", E 393, 396, 399, 404, 408, is a condition of its license, and while it clearly confers a right on the public collectively, as personified by the United States, it would not seem to give any right to individual members of the public, with whom the station has no contractual arrangements. Even if under the Communications Act, individual members of the public have a "right" to receive broadcasts, that "right" would not, necessarily or otherwise, import the right, in any individual member of the public to retransmit a broadcast of a copyrighted work for profit, to other members of the public, after receiving it, as petitioner does.

Petitioner's argument proves too much. If the public has the "right" which petitioner claims, and the Solicitor General seems to assume, then there is no reason why, subject to the provisions of section 325(a) of the Communications Act, a broadcasting station, such as WBOY in Clarksburg, would not be free without the consent of the copyright owner to rebroadcast broadcasts of copyrighted works of the television stations in Pittsburgh, Wheeling or Steubenville, or petitioner's retransmissions of them, WBOY being one

of petitioner's customers. But, see p. 9, *supra*. Nor would there be any reason why petitioner or some other entrepreneur might not receive such broadcasts, and, instead of relaying and distributing them to receiving sets in the homes and commercial establishments of its customers, retransmit them to receiving sets in theatres, auditoriums, meeting halls and assembly rooms, where neighbors might foregather and view them in each other's company, at a price. For, if the public has a "right" to "receive" broadcasts under the Communications Act, and the public's "right" in that regard is superior to the exclusive right of copyright owners publicly to perform their works for profit, as petitioner claims, then there is no reason why the broadcast of a copyrighted work should not be open to such exploitation.[27]

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[27] Petitioner's argument based on § 325(a) of the Communications Act, Pet. B. 80, 81, overlooks two controlling factors pointing wholly the other way. First, as the Federal Communications Commission has made clear, the reason why the Commission doubted whether an extension of that section to cover retransmissions such as petitioner's "would be effective", Pet. B. 81, fn. 105, was that a broadcasting station "cannot bestow broadcasting or transmission rights to programming it does not own (or as to which it has not obtained a license to do so)", *First Report and Order*, 2 FCC 2d 725, 768, 769 (1966), i.e., that a television station normally has no rights in its programming to grant or withhold. Secondly, in rejecting the proposed amendment to expand § 325(a) to retransmissions such as petitioner's, the Senate Committee reported, S. Rep. 923, 86th Cong., 1st Sess., p. 11:

> Your Committee desires . . . to make it crystal clear that in recommending this legislation it is not affecting in any way the private rights which may have existed prior to the enactment of this bill. No such inference should be drawn because of the failure to apply Section 325(a) which would require the community antenna system to obtain the consent of the originating station nor should any such inference be drawn which may have an effect on any private law suit by the inclusion or exclusion of any language in this legislation.

(f) *That the retransmission of a broadcast of a copyrighted work is limited to places within the Grade B contour, so-called, of the station broadcasting such program, does not dispense with the necessity of securing the copyright owner's consent. The Grade B contour concept is wholly irrelevant.* Whether the condition of things last described may obtain anywhere with respect to broadcasts emanating from anywhere, or is limited to the confines of the Grade B contour, so-called, of the broadcasting station, is not a matter of principle, but merely one of degree. In either event, the violence done the Copyright Act is the same, the only difference being the extent of the area in which the violence may be committed.

Moreover, the Grade B contour is not a concept which lends itself to the uses of copyright. It is a mere "rule of thumb", a "theoretical prediction" based on assumptions that may or may not be true in respect of any television station, and, as they do in this case, the facts may fall far short of the predictions. See, pp. 6-8, *supra.* The Grade B contour, furthermore, is a concept of communications regulation which the Federal Communications Commission has devised for administrative convenience, and to meet conditions peculiar to the communications field, without any reference to copyright. The Commission's convenience, or those conditions, may change, indeed they are changing, and for these reasons or any other, the Commission may alter or abandon the contour concept in whole or in part at any time. Clearly, to tie an exception to the Copyright Act, as to which the Federal Communications Commission has no responsibility, to an administrative regulation of the Commission which the Commission can rescind or modify at will, would be a chancy thing for which there is no precedent. Cer-

tainly, too, the inadequacy of the contour lines as a measure for copyright purposes is emphasized by the *caveat* the Solicitor General notes.[28] As the Solicitor General seems to recognize, the adoption of his suggestion, and petitioner's contention in this regard, would be but a prelude to many disputes and much litigation. U.S. Mem. 15, 16.

Nor is it any answer to the unsuitability of the Grade B contour as a measure of copyright, that the Federal Communications Commission will entertain applications to conform a station's Grade B contour to its actual service area. U.S. Mem. 14. The Federal Communications Commission has no jurisdiction over copyright, and it may be doubted whether it would have jurisdiction to entertain applications of this kind from copyright owners, as such. In any event, it would be an anomaly to add to the burdens of an already overburdened administrative agency, new and onerous functions pertaining to rights and obligations under a statute in regard to which it has no statutory duties. The Solicitor General, U.S. Mem. 15, 16, looks to a "case-by-case resolution" of the problems arising when, as is the case here, the Grade B contours of one are more stations overlap the Grade A contour of others. The Solicitor General, however, leaves open whether questions such as these would be resolved by the Federal

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[28] Significantly in the brief for the United States in *U. S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, it is said, p. 20, fn. 18, that

> The question of *whether the Grade B contours of the Los Angeles stations reach into San Diego was not resolved by the Commission,* since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. *It held that the policy considerations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego.* [Emphasis supplied]

Communications Commission in administrative proceedings, or by the courts in infringement actions. In either event, the unsuitability of the contour concept as a measure of copyright is emphasized.

The Solicitor General, U.S. Mem. 16, calls his proposal one which would effect "a substantial coalescense of communications policy and copyright policy with respect to CATV". But, copyright policy as established by the Congress in the Copyright Act is, expressly, to reserve to copyright owners the exclusive right publicly to perform their works for profit in any manner or by any method whatsoever, and, as this Court said in *Buck,* 283 U.S. at 197, this extends to "*all* public performances for profit". [Emphasis supplied] There has been no Congressional action modifying this policy in any respect whatsoever, and there has been no expression by the Congress of any purpose or intention that copyright policy be modified in regard to CATV, or that it be sacrificed to any extent whatsoever in order to "coalesce" it with communications "policy" for any purpose whatsoever. With the matter in this posture, there is no room for the "coalescense" for which the Solicitor General speaks. *Cable Vision Inc.* v. *KUTV, Inc.,* 335 F. 2d 348, 353 (9th Cir. 1964), cert. denied, 379 U.S. 989.

CONCLUSION

This review does not involve any question whether a license in favor of petitioner may be implied *in fact* from the circumstances. That question the District Court reserved for later trial and determination, A. 104, fn. 19, 166-168, 174; Pet. 9, fn. 4, and has *yet* to be tried. The questions before the Court on this review are, 1) whether in doing what it did, peti-

tioner publicly performed respondent's copyrighted works, and, 2) if so, whether under the Copyright Act or the Communications Act, or "communications policy" or in consequence of some interplay between them, an exception—(whether called a "license" implied in law or something else)—to the unqualified exclusive right of copyright owners publicly to perform their works for profit, as prescribed in the Copyright Act, can or should "be established in law by this Court", U.S. Mem. 4. Respondent believes not.

Contrary to the picture petitioner and its trade association would draw, petitioner's industry plays no David to respondent's industry's Goliath. As petitioner and its trade association must know, the number of customers served by the "average" retransmission system, Pet. B., fn. 7 at 7, is no measure of the financial stature of those who, directly or indirectly, own such systems. Indeed, as petitioner and its trade association are undoubtedly aware, the roster of corporations, directly or indirectly, owning such systems, or having substantial stakes in them, is star-studded with financial giants.[29] While some CATV systems are, of

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[29] E.g., General Electric Co.; Westinghouse Electric Corp.; Time-Life, Inc.; General Telephone and Electronics Union; Teleprompter, Inc.; Triangle Publications, Inc., i.e., the Philadelphia Inquirer; Scripps-Howard Broadcasting Co., Inc., i.e., the Scripps-Howard newspapers; Cowles Communications, Inc. See, *Copyright Law Revision,* Hearings on S. 1006, Subcommittee on Patents, etc., Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4 and 25, 1966, pp. 237-239; *Hearings on H.R. 4347,* etc., Subcommittee No. 3, H. Committee on the Judiciary, 89th Cong., 1st Sess., Part 2, pp. 1375-1377; *Copyright Law Revision,* 113 Cong. Rec. H3857, at H3880, H3881, April 11, 1967, remarks of Hon. Emanuel Celler; *Television Fact Book,* 1967 Ed., No. 37, Service Volume, pp. 568a-583a. The *Wall Street Journal,* May 8, 1967, p. 9, col. 4, reported the sale to one purchaser of about 4% of the stock of a leading CATV operator, having a market value in the neighborhood of $5,250,000.

course, small, some are not, and the trend appears clearly to point to gigantic systems, if not today, certainly before very long. Thus, it is reported that franchises have been granted for CATV systems in Denver expected to cost some $60 million, and in Philadelphia expected to cost some $37 million.[30] CATV systems now in process of construction on Manhattan Island are reported as having a potential of about 500,000 customers, indicating annual revenues in the neighborhood of $30 million.[31] The potential in CATV is obviously what has attracted great enterprises to it, and the chief executive of one of these is reported to have confidently stated that "in a decade [broadcasting] stations will be receiving network programs via satellite, retransmitting them plus local programs over the air and * * * the cable systems [CATV] will feed all that material to at least 85% of TV homes".[32] Another executive of one of the large enterprises owning CATV systems, is reported to have predicted not so long ago that "by 1985, 46 million homes will be connected to 23,000 CATV systems, serving 110 million people taking in $2.3 billion annually — very likely equaling or exceeding the annual dollar volume of TV broadcasting itself * * * ". He is also reported as foreseeing that "several key production centers may replace hundreds of TV stations".[33]

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[30] *Cable Television Review,* June 12, 1967; Hearings on H.R. 4347, *supra,* fn. 29, Part 2, p. 1350.

[31] *New York Times,* December 4, 1964, p. 46 and November 23, 1967, p. 83.

[32] J. Leonard Reinsch, President of Cox Broadcasting Corp., as reported in *Broadcasting* magazine, January 15, 1968, p. 58.

[33] Roger Clipp of Triangle Publications, Inc., as reported in *Television Digest,* July 3, 1967, p. 2.

Thus, if CATV is free to retransmit broadcasts of copyrighted works without copyright liability in any area, no matter how limited, notwithstanding burgeoning audiences for performances of their works, copyright owners will be met with an ever decreasing market for them as their paying customers are "replaced". In these circumstances, the incentive to create will not be there. Copyrighted material is the staple of television entertainment programming, which is the fare on which CATV feeds its customers. The tragic and ironic consequence of CATV exemption from copyright liability, even if limited to the Grade B contours of the television stations whose broadcasts they retransmit, may well be to discourage the creation of the very programs without which CATV, as it now functions, could not survive.

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APPENDIX

Copyright Act, Sections 1(c), 1(d) and part of Section 1(e), Tit. 17 U.S.C. §§ 1(c), 1(d), 1(e):

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work rendered to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; * * *.

Communications Act, Section 2(a), Tit. 47 U.S.C. § 152(a):

> (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

Introduction 1

I. Petitioner's Antenna Systems Do Not Perform The Copyrighted Works 3

II. There Is a License Implied In Law To Receive Authorized Broadcasts Off The Air By Any Antenna The Public Chooses, Including a CATV 17

III. The Minimum Area Of The Public's Right To Receive Is The B Contour 29

Conclusion 37

TABLE OF AUTHORITIES

CASES:

Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 18

Buck v. *Debaum*, 40 F.2d 734 (S.D. Calif. 1929) 17

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 3, 4, 5, 6, 11, 17, 19

Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 32

Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1932) 27

In re Shen-Heights TV Assoc., F.C.C. Docket Nos. 17391-94 (released Feb. 23, 1968) 25, 26, 36

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 3

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 33

United States v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) 16

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 3, 11, 13, 16

STATUTES AND RULES: Page

Communications Act of 1934:

47 U.S.C. § 325(a) 19, 35

Copyright Act:

17 U.S.C. § 1(c) 7, 8
17 U.S.C. § 1(d) 7
17 U.S.C. § 1(e) 6

Code of Federal Regulations:

47 C.F.R. ¶ 73.658 33

SPECIAL REPORT AND ORDERS OF THE F.C.C.:

Second Report and Order, Community Antenna Television Systems, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966) (herein cited as "Second Report and Order") 22, 23, 25, 30, 34, 35

TV Broadcast Financial Data—1966, F.C.C. No. 5317, Public Notice, released Aug. 25, 1967 29

Broadcast Revenues, Expenses and Income of Television Broadcast Industry—1956, F.C.C. No. B-49308, Public Notice, released Aug. 22, 1957 29

LEGISLATIVE MATERIALS:

Hearings Pursuant to S. Res. 201 on S. 1006 before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 4, 14, 26, 35, 36

H. Rep. No. 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* (1967) 6

112 Cong. Rec. A5623-24 (daily ed. Nov. 1, 1966) 11

Hearings on Regulatory Agencies before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess., Ser. No. 90-1 (1967) 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

INTRODUCTION

While this case has far-reaching consequences for community antenna television and its continued service to large segments of the public who have elected to use it for their television reception, decision of the case must necessarily rest on the facts concerning the operation of petitioner's community antenna television systems and not possible or theoretical operations of

some CATV system in the future. It is necessary to say this because respondent and amici seek to buttress their performance arguments with purported facts that bear no resemblance to the case before the Court.

Petitioner does not "sell programs" as asserted and heavily relied on by the National Association of Broadcasters (NAB);[1] petitioner does not delete advertising from the broadcasts in order to sell and insert its own advertising as respondent and nearly all amici seem to fear "may" happen some day. So far as we know, there is no such practice by any CATV systems. The court below found that the signals of all stations received were carried "without any editing or selection of programs." A. 1346. Petitioner does not originate programs and respondent's assertion that CATV "can, and some systems do originate some of their own programs" (Respondent's Brief (hereinafter "Res. Br.") 63) was answered by the court below when it noted that petitioner's systems did not originate, had no equipment to originate, and the added costs of new equipment to originate would be substantial. A 1349. While respondent and some amici raise the dread specter of CATV systems carrying signals from New York to Los Angeles if CATV is held not to infringe, microwave is not involved in this case (and in any event is subject to F.C.C. regulation); the systems before this

[1] This is not a "pay-TV" case. While respondent, and a number of amici emphasize some advertisements of petitioner referring to particular programs to attract subscribers to its systems, this does not constitute selling programs any more than can a television set manufacturer or rental service be said to be selling programs when they seek to attract purchasers or renters by advertising the World Series or a prominent football game. Petitioner's fee was at a flat rate without regard to what programs, if any, were viewed by subscribers.

Court are within or near the Grade B contour, and in the service area of the stations whose signals are made available to subscribers.

I

Petitioner's Antenna Systems Do Not Perform the Copyrighted Works

1. The Solicitor General recognizes that to conclude that a CATV performs the copyrighted work requires that the copyright monopoly be extended to control a "new technology" not contemplated by the Congress when the existing Copyright Act was adopted and as to which "there is no direct evidence of congressional intent."[2] Memorandum for the United States as Amicus Curiae (hereinafter "Mem.") at 2. In that portion of his Memorandum dealing with a license implied in law, the Solicitor General discusses *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), and distills from that case the principle which petitioner believes is applicable here in determining performance:

> ". . . Just as in *White-Smith* . . . where it was concluded that copyright protection [against mak-

[2] Respondent's position boils down to the contention that any "newer technology" (Res. Br. 19) must *ipso facto* be copyright infringement. The decisions relied on by respondent prove no such thing. In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the operations of the radio receiving system in the hotel were held to constitute a "performance" not because radio was a new development but because the operations of the hotel fulfilled the traditional meaning of "performance" by making available with its own equipment to its guests "the hearing of a copyrighted musical composition . . . ." 283 U.S. at 195-96. Similarly in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911), the Court's holding was not based on the novelty of motion pictures, but on the conclusion that the making of a movie based on a novel fit the carefully analyzed meaning of the statutory term "dramatize."

> ing a copy] did not extend to player piano rolls—a new development not contemplated by Congress—this Court could hold that until Congress acts specifically, it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area." Mem. 7.

To hold that off-the-air reception of broadcasts by CATV and transmission of the signals by wire or cable to subscribers is not a "performance" within the meaning of the Act would not only avoid such an unwarranted judicial extension of the copyright monopoly; it would also avoid the "potential for monopolization" (Mem. 6) as a consequence of imposing liability; it brings about a full "coalescence" (Mem. 16) of the copyright law, the antitrust laws and the Communications Act, and requires no change in the F.C.C. regulations under that statute.

Without referring to the rule which he finds established in *White-Smith*, or to the earlier views of the Department of Justice that "extension of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences and that this extension is not justified by valid considerations of the right to copyright protection,"[3] the Solicitor General suggests that the operations of the CATV "results in a 'public performance'." Mem. 4. His reasons are different from those asserted either by the courts below or respondent. Their reasoning turned centrally on the decision in *Buck* v. *Jewell-LaSalle Realty Co.*,

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[3] *Hearings Pursuant to S. Res. 20 on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 211-212 (1966).

283 U.S. 191 (1931), and an analogy to broadcasting. The Solicitor General cites no authority for his performance theory and brushes aside the decision in *Jewell-LaSalle,* saying that whether or not that case is "directly pertinent" is not "of controlling significance." Mem. 2. He looks to *Jewell-LaSalle,* but solely for a "basic approach" (*id.*) to construing the statute "in light of new technology." Mem. 3. "[I]t seems clear," he argues, "that CATV systems engage in a significant array of activities directed toward providing television signals to persons at least some of whom would not otherwise be able to receive them . . ."[4] Mem. 3-4. The vague and undefined "array of activities" consists either of the "electronic process" or of the "substantial amount of things [the systems do] to permit their subscribers to receive signals" although the Solicitor General never says which is decisive or why either is relevant to his argument. Mem. 4.

The performance which "results" is never defined by the Solicitor General. It is not the "actual rendition" since that takes place in the "privacy of a number of homes, rather than in public."[5] Mem. 4. More-

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[4] The Solicitor General does not explain the relevance of his suggestion that "some" subscribers may not otherwise be able to receive the broadcasts. Whether or not the subscriber could use other means (their own antenna, or join a cooperative antenna system as done by others in Clarksburg and Fairmont) has no apparent bearing on the rationale proposed by the Solicitor General for finding performance.

[5] Despite the fact that the only rendition occurs in the home, the Solicitor General makes the unexplained assertion that "the image is present within the system and it is provided to the consumer by the CATV intermediary." Mem. 5. What "image" he is talking about is left undefined, presumably because it does not exist.

over, the rendition in the home, the actual viewing, is concededly non-infringing.

The Solicitor General, like the courts below, seeks support for his conclusion in an analogy, but he turns to an analogy not suggested by either of the courts below. He asserts that CATV does " 'reproduce' the copyrighted work in a 'manner' or by a 'method' as effectively as if the CATV system made a tape recording of the copyrighted work and offered it for sale. . . ."[6] Mem. 4. The analogy of a tape recording bears no resemblance to the facts of this case;[7] it is undisputed that petitioner's CATV systems neither embody nor produce any recordings or transcriptions (which would have been specifically covered by the

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[6] The Solicitor General uses the word "reproduce" (Mem. 3, 5) in this context, and the NAB in its brief suggests that this has special significance. NAB Br. 35 n. 76a. The significance of "reproduction" is made clear by the decision in *Jewell-LaSalle*, 283 U.S. 191 (1931), which NAB quotes: "the reception of a radio broadcast and *its translation into audible sound* . . . is essentially a reproduction" (*id.* at 199-200, emphasis supplied) which "amounts to a performance." *Id.* at 201.

The legislative history of the parallel provisions of § 1(e) (passed after the *White-Smith* decision) which conferred reproducing rights with respect to a musical composition, makes clear that the Congress was concerned with audible renditions of musical works. The Committee Report speaks of "reproduction of . . . music by phonographs, graphophones, or the ordinary piano-playing instruments." H. Rep. No. 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright*, 959, 964 (1967).

[7] The analogy of making an undeveloped photograph (Mem. 4-5) is equally not apposite. To adapt the analogy of the undeveloped photo to the CATV case, the relevant question would be whether a person who transported (or transmitted) the undeveloped photo, made by someone else, to members of the public for whom the photo was intended, without being able to make it visible (*i.e.*, develop the photo), had made a copy or reproduced the photo.

language of §§ 1(c) and 1(d)),[8] and petitioner purports in no way to sell or display a record of a program, any interest in a program or a rendition of a program.

The Solicitor General's notion of a performance arising from a "substantial amount of things" (Mem. 4) done to permit subscribers to view the picture, like the magnitude-of-contribution theory of infringement of the court below (A 1353-54), opens the way to bring a wide variety of businesses within the control of the copyright monopoly. Certainly apartment-house master antennas which engage in the same "array of activities" as a CATV would be labelled as infringers. The "substantial amount of things" test similarly is sufficiently indefinite that it could cover set manufacturers, utilities which provide telephone lines connecting stations in a network, and many of the new technologies for communication which the district court recognized (A 103-104) are either already in use or on the horizon.

The "substantial amount of things" rationale also departs completely, of course, from the "ordinary sense" test of the meaning of the statutory words established by this Court in *White-Smith*.

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[8] The Act itself makes clear that the making and selling of a tape recording, without making the recorded work audible or visible would not constitute a "performance" or "reproduction" of the work; it would be covered, rather, by the exclusive right expressly granted by § 1(d), "to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced . . . ." See also the comparable exclusive right expressly granted in § 1(c) as well as the exclusive right in § 1(d) "to vend any manuscript or record whatsoever thereof . . . ."

2. Respondent, whose theory of performance bears little relation to the Solicitor General's theory, has endeavored to obscure the fact that under the Copyright Act two essential elements must be found before it can be concluded that there is infringement liability—a "performance" of the copyrighted work "in public." Unless there is a "performance," it makes no difference whether the acts are in public or in private.[9] Respondent confuses this issue of statutory construction by reiterating that petitioner's two CATV systems have a combined subscribership of 15,000. But it makes no difference if the number is 15 or 15,000 *unless* petitioner's community antenna systems perform the copyrighted work. If it were concluded that there is a performance, then and only then the number of subscribers may be relevant to the issue of "in public."[10]

The issue is and remains whether what petitioner's community antennas do is a performance. The district court faced this issue and found "performance" in the electronic operations of the equipment, which, by a process of statutory construction it called "semantic

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[9] Respondent's confusion is evident in its discussion of the *Remick* and *Messager* cases. Res. Br. 24-25. Both cases clearly recognize that the "performance" by a broadcaster takes place in the studio and both address themselves to the question whether the broadcast met the requirement of making the performance "public" (holding, of course, that it did). See discussion, Pet. Br. 43-47. Respondent attempts to distort these holdings by disregarding the "in public" requirement and pretending that the size of the radio audience was deemed relevant to the "performance" issue. Res. Br. 24-25.

[10] Similarly, neither the cost of the antenna service equipment referred to by respondent nor the fact that petitioner is providing the antenna service as a business for profit is relevant to the question of performance. Profit is an element which must be shown, in addition to performance, for infringement under § 1(e).

extension" (A 105 n. 21), it held should be treated "*as if* there were a classical performance." A 72 (emphasis supplied). There were two alternative technological theories. First, it found "performance" in the way the tubes (or transistors) in the equipment functioned; because of the way the circuitry was arranged, each tube made an "electronic reproduction" of the signal. The second theory, repeated here by the NAB in its brief, was that petitioner's equipment carried out the electronic function of "modulating" (shaping) the signal and hence the CATV's electronic operation was equivalent to that of a broadcasting station because a broadcaster *has* to modulate the signal in order to broadcast it.[11] NAB does not argue that the equipment is the same—it is not—its argument turns solely on the electronic process of modulation. The "modulation" theory which was respondent's original theory[12] and which respondent has now abandoned, is based on an error in fact. As the court below correctly found, petitioner at one time had a piece of equipment (a "Teletrol") which modulated the video carrier, but not the sound carrier. A 1348-49. Neither the modern equipment petitioner used at the time of trial nor the older equipment used before the Teletrol modulated the video or audio carrier. *Ibid.* The NAB's theory that a broadcaster performs and therefore CATV performs is built on "modulation" and falls because it is based on an erroneous assumption of fact that modulation is essential or typical of the operation of CATV

[11] NAB asserts that the electronic processes of CATV equipment and a broadcaster's equipment are "identical" (NAB Br. 36, 21-22) because a broadcaster's equipment and CATV equipment "modulates" (*id.* at 22 n. 30) the signal, or because of the "shaping [of the] electromagnetic waves" (*id.* at 36) by the CATV equipment.

[12] See Ex. D, E 339.

equipment—quite apart from the strange assumption that the issue of "performance" and copyright infringement could turn on the electronic treatment of an electromagnetic wave.

The court below rejected the district court's technological approach (A 1357 n. 9) and held that the "performance" was to be found in the "contribution" by the antenna system to viewing by subscribers; a "contribution" to something—*i.e.,* viewing—which is concededly non-infringing. ASCAP, in its brief amicus, argues several variants, that petitioner is "engaged in the presentation of," "responsible for," or "responsible for participating in," a performance (ASCAP Br. 13), but it is never clear who is putting on the performance in which the petitioner is "participating" or for which it is "responsible." If the performance is in the homes, then petitioner is "participating" in a non-infringing activity. If the performance is in the television station, it is licensed and non-infringing.

In its present brief, respondent rejects its earlier technological theory by agreeing with the court below that "the technical means by which the result is produced are irrelevant." Res. Br. 19. But despite that concession, it argues that "amplifying, processing and retransmitting the electromagnetic radiation" by petitioner's systems (Res. Br. 16) is a "performance." Every radio set, every television set, every master antenna and every common carrier does exactly the same electronic operations which respondent argues is the performance.

Respondent now also urges for the first time that the performance lies in "communicating the pictures and sounds which comprise it [the copyrighted work], in whatever form they may be, to where they will be-

come visible and audible to prospective viewers . . . ." Res. Br. 16. This latest theory departs furthest of all from any recognizable meaning of the statutory term "to perform"—the term whose "ordinary sense" and "common understanding" (*White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, at 16-17) this Court emphasized and applied in the *Jewell-LaSalle* case when it repeatedly pointed out that the acts and equipment of the hotel had brought about not only the reception of the broadcast but its "translation into audible sound" (283 U.S. at 199-201). Respondent's theory might be appropriate if the statute had granted an exclusive monopoly of the right to "communicate" or "transmit" the copyrighted work; it has no application to the right "to perform". The theory would hold every telephone and telegraph company, every apartment-house master antenna and, indeed, every individual television antenna inasmuch as the wire from the antenna to the receiver serves the forbidden function of "communicating the picture and sound," in their electromagnetic "form" "to where they will become visible and audible . . . ."[13]

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[13] While the communicating theory might benefit respondent, it has far-reaching consequences for the public now and in the future, for its adoption would result in prejudging the question of copyright infringement for many future means of communication which are now expected.

> ". . . there has been a proliferation of new types of communication: the laser beam, video-telephones, educational TV programming, time-sharing, data processing information and communication systems that are feasible on a continental basis. . . .
> . . . .
> "The home of the not-too-distant future will become an electronic library with ready access to the world's great literature, scientific achievement, the lives and deeds of great men." (Gerald L. Phillippe, Chairman of General Electric Company. Remarks reprinted, 12 Cong. Rec. A5623-24 (daily ed. Nov. 1, 1966).

Respondent's new theory rests on a confusion of the broadcast signal (the electromagnetic energy) with "pictures and sounds which comprise [the copyrighted work]." Respondent has been frank in acknowledging that it does not and cannot claim copyright in the electromagnetic energy received and transmitted by petitioner's CATV. That electromagnetic energy does not become "pictures and sounds which comprise" the copyrighted works until they become "visible and audible to prospective viewers" in their homes, and respondent is aggressive in its assertion that viewing by subscribers is not infringement or, indeed, even within the copyright monopoly.[14] Res. Br. 23, 34, 43.

This new "communicating" theory, like the transmission theory in its brief in opposition, departs completely from the court below. Respondent sharply separates "performance" from viewing, arguing now that the viewing by subscribers is not covered by the copyright monopoly. Res. Br. 34. The court below, on the contrary, regarded the viewing as essential to its theory of performance, for it was the "contribution" to the viewing which was the "result" the court found decisive in determining performance. Respond-

[14] Respondent has just lately arrived at that position. In the court of appeals, respondent expressly reserved an infringement claim against "defendant's commercial subscribers" who maintain television sets open to the view of the public (Brief for Plaintiff-Appellee at 68 n. 73), and asserted also that "defendant's subscribers, who . . . enjoy the reproduction and performance of the television programs 'in the privacy of [their] home,' participate both realistically and in contemplation of law, in a *public* performance." *Id.* at 40-41 (emphasis in original). Of course, if petitioner's CATV systems were held to infringe, it would still follow that the subscribers who contract for petitioner's service might be liable as contributory infringers—a possibility that respondent still finds attractive. Res. Br. 27-28.

ent now concedes that the question whether petitioner has performed must be judged without regard to, and separate from, the viewing. Viewing may be relevant to the question whether the performance is "in public," but the argument for performance by the CATV system must be based on the reception and transmission of the broadcast signal by the CATV system without regard to the public's viewing on their own sets, and cannot be based on the public's viewing on their own sets.[15]

In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 17 (1908), this Court said that the statutory words should be construed in accordance with their "common understanding." This disparate array of "understandings" put forth by respondent and its supporters as to what constitutes the alleged "performance" by petitioner's antenna service is ample demonstration that none of these theories embodies any "common understanding." The district court was correct in effectively conceding that the "words 'to perform' as commonly used in everyday speech by the average layman are not intended to encompass the aggregate or composite of the acts of [petitioner's systems]". A 67. This Court should adhere, as it did in *White-Smith*, to the commonly understood meaning of the statutory word.

3. The Solicitor General sets forth the serious consequences arising from the conclusion that the recep-

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[15] Respondent urges application of the principle in *Kalem*, 222 U.S. at 61, that the test (in construing the statutory word "dramatize") is whether "we see the event or story lived." Res. Br. 16. When there is no sight or sound in the method or system of "communication," one does not "see" the event or story lived; there is nothing but electromagnetic energy. One "sees" the story lived in the homes, but, as respondent concedes, that is non-infringing.

tion off the air of a broadcast licensed by the copyright owner and the transmission of the signal to subscribers, without sight or sound, is a public performance of the copyrighted work.

CATV systems, started in 1949, are for the most part located in small towns and are operated mainly as small businesses.[16] The Solicitor General, like the Department of Justice in earlier testimony,[17] is concerned with the anticompetitive consequences of imposing copyright liability on CATV. Mem. 7 n. 4. Imposition of copyright liability means that CATV will fall under the control of the few large copyright owners. This could occur as a consequence of the burden of back liability, a liability which in a single month would exceed the cost of the systems if damages "not less than $250.00 for each infringement" (the statutory minimum) were assessed for the reception of each broadcast of a copyrighted work, as respondent here demands. A 154.[18] NAB urges that minimum statutory liability is not mandatory and would not be imposed (NAB Br. 53-61), but ignores the fact that without regard to the burden of past liability, the complete absence of bargaining power on the part of

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[16] See amicus brief of National Community Television Association, Inc. at 6.

[17] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 211-215, quoted in petitioner's main brief at 62-64.

[18] A CATV system such as petitioner's capable of receiving the broadcasts of 5 stations will receive about 1500 broadcasts a week of which at least 1000 are copyrighted. This is exclusive of copyrights on music which may also be broadcast. If liability for past infringements were assessed at the statutory minimum of $250.00 as claimed by respondent for the reception of each broadcast, the liability for one week exceeds $250,000.00 and for one month exceeds $1,000,000.00.

CATV systems would still subject them to the control of the copyright owners. Thus the Solicitor General sees no way to deal with the problem facing a CATV operator in negotiating licenses where he has no control over the programming and does not even know what is to be broadcast, until after the event. In its brief, ASCAP describes the task of negotiating music licenses without an ASCAP-type organization as "impossible."[19] ASCAP Br. 8. Obviously, as the Solicitor General notes, there would be no provision for "reasonable royalty arrangements, compulsory licensing in certain areas, or a workable royalty payment scheme." Mem. 17.

Thus, the danger is real, as the Solicitor General recognizes, that the "relatively diffuse" CATV industry will come under the control of "three networks and seven major movie studios" in whose hands "television programming is concentrated." Mem. 7 n. 4. This control, moreover, could destroy the potential future development of CATV "in the public interest." *Ibid.*

Respondent (Res. Br. 28) and the NAB (NAB Br. 38) attempt to get around the fact that their respective (and differing) theories of performance mean that infringement liability will be imposed on apartment-house master antennas. Respondent asserts (Res. Br. 28) that petitioner's systems "did not involve any such apparatus [as master antennas], and that no such question was considered below . . . or is now before this Court." This is misleading. Respondent's own expert testified that the function of an apartment-

[19] We submit that the Court should not strain to find performance since it will encourage, or indeed require, the creation of a new ASCAP-type organization to license CATV.

house antenna was the same as that of petitioner's antenna systems (A 641-642), and the court rejected petitioner's offer to prove that the equipment is the same. A 902-904. The issue is in effect before the Court since respondent's theory of performance covers the master antenna.

The NAB argues, contrary to the record, that an apartment house furnishes "no elaborate transmission facility" like CATV,[20] that it does not advertise, and that all the apartment house does is simply to supply an antenna in the same way a refrigerator is furnished.[21] The theories of respondent and the amici cover the apartment-house antennas and threaten the television service that millions of apartment dwellers now enjoy.

The consequences of extending the copyright monopoly to cover this novel area are relevant to a determination as to whether "performance" should be given a strained construction to cover the operations of petitioner's community antenna systems. The rule of construction which the Solicitor General concludes was established in *White-Smith* (see pp. 3-4 *supra*) points to the conclusion that there was no performance.

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[20] See *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 564-65 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[21] In fact many apartment houses charge a separate fee for the antenna service, but is it legally significant that an apartment dweller pays for a master antenna service in his rent while a householder pays directly for a community antenna system? It is hard to see how NAB's reference to advertising is relevant. Would an apartment house be an infringer if it advertised its master antenna service and petitioner not be an infringer if its advertising never referred to a program the subscriber could view?

II

There Is a License Implied in Law To Receive Authorized Broadcasts off the Air by Any Antenna the Public Chooses, Including a CATV

1. In the third part of his Memorandum, the Solicitor General concludes that there is a license implied in law to receive authorized broadcasts with the assistance of a CATV in a station's service area (which he limits by the Grade B contour).[22] While, as we shall discuss later, we believe that the license implied in law (assuming *arguendo* that there is a performance by the CATV system, which petitioner denies) extends to all simultaneous off-the-air reception, petitioner agrees that the area within which there is a license in law to receive is at least as broad as the Grade B contour, which the Solicitor General calls the normal service area. Mem. 14-15.

It is clear, moreover, that the right of the public to receive stems, as the Solicitor General concludes, from a license implied in law, not a license implied in fact, as respondent now tries to urge. Res. Br. 37-38. The issue reserved in *Jewell-LaSalle,* 283 U.S. at 198, 199 n. 5, was whether there was a license implied in law for reception off the air of an *authorized* broadcast (in *Jewell-LaSalle* the broadcast was not licensed).[23] The courts below had no doubt on this score. The

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[22] The Solicitor General's "caveat" to the license implied in law is discussed at pp. 29-34 *infra*.

[23] The Court's citation of *Buck* v. *Debaum,* 40 F.2d 734 (S.D. Calif. 1929), of course did not necessarily imply "acceptance" of that case (see Res. Br. 29 n. 10), since the Court was reserving the question, but the issue on which judgment was being reserved was plainly the issue decided in *Debaum*—the issue of a license implied *in law*.

court of appeals held that the record presents as a matter of "appellate first impression" (A 1360) the question whether a license "should be implied in law." A 1358. And the trial court described the issue as "not whether there *is* an implied in law license" but "whether there *should be.*" A 88 (emphasis in the original).

Respondent's argument based on the patent cases (Res. Br. 37-38 & n. 14) that the courts have only upheld a license implied in fact and that a license will not be implied if the patent owner's intentions are "otherwise" is without foundation. In *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964), there was a specific attempt by the patent owner to reserve the right to license sales of replacement fabrics and the patentee's attempt to limit use by contract was overridden since the license to use was implied in law. *Id.* at 497.

Respondent's argument (Res. Br. 43-44) that the rule of *Aro* has no applicability because "the public certainly has no license publicly to perform the copyrighted work in the manner petitioner performs it" disregards the problem of the audience (*i.e.*, the public) for which the broadcast was as a matter of law intended. In substance, this narrow construction of the *Aro* rule would require the very public for whom the broadcast was intended to "do-it-yourself." See 377 U.S. at 495.

Respondent also argues that if there is a right to receive, broadcasters and Muzak will no longer have to pay for the programs they originate. Res. Br. 67-68. Respondent's purported fears are based on the false analogy between the broadcaster and petitioner's an-

tenna service.[24] A broadcaster is an originator of programs and it makes no difference whether he uses his own studios to originate or gets his program from a distant source (whether from a network studio by common carrier or reception off the air from another station for rebroadcasting).[25] In either event, the broadcaster retains his personal responsibility for originating the programs. Muzak is an originator of programs and provides equipment to make the programs audible in their subscribers' establishments.[26] Implying in law a license to receive, therefore, in no way affects the application of the copyright law to broadcasters or Muzak.

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[24] The brief amicus of the All-Channel Television Society attaches as an appendix a rate card of a community antenna operator who is also engaged in the closed circuit television business. The rate card plainly relates to the closed circuit operation and *not* the community antenna service.

[25] The license implied in law for the public to receive does not change the prohibition in § 325(a) of the Communications Act (47 U.S.C. § 325(a)) against rebroadcasting without the consent of the originating station.

Respondent speaks of "strenuous objection" by petitioner's antenna service to "rebroadcast " by the Clarksburg television station of the programs of another station using the signal from petitioner's antenna service for that rebroadcast. Res. Br. 9. The reason for petitioner's concern was that the telephone company, with whom it had to negotiate pole rental agreements, would regard unfavorably the loss of its network connection fee if WBOY got its signal from petitioner's CATV instead of using the telephone lines. Petitioner's concern was unrelated to programs or competition with the station. A 801.

[26] Muzak fits the description in *Jewell-LaSalle,* where the "translation into audible sound" (283 U.S. at 200 201) of the music "by instrumentalities under its control" (id. at 201) constituted what the Court called "essentially a reproduction" (*id.* at 200) which "amounts to a performance" (*id.* at 201).

2. We turn now to the reasons why the Solicitor General was correct in his conclusion that there is a license implied in law to receive broadcasts off the air with antennas of the public's choice, including CATV systems, and why he was incorrect in his conclusion that there should be a limitation on that right.

The Solicitor General begins his analysis with the assumption that petitioner is contending for an "implied license" in favor of CATV systems that is "tantamount to holding that once a copyrighted work was licensed to anyone, it was irrevocably and entirely committed to the public domain." Mem. 9. Respondent echoes this view. Res. Br. 35, 41. This is a great overstatement of petitioner's position. Our position is only that when a copyright owner licenses the broadcast of his work for "reception by the public," he has "released" *that broadcast* (not the copyrighted work) for simultaneous reception off the air by the public, utilizing any antenna and set it chooses. There is no suggestion that the work itself is thereby committed to the public domain—no suggestion that the copyright owner may not license other broadcasts. The copyrighted work is no more "dedicated" by reception of that broadcast when a member of the public uses the services of CATV than when he uses his own antenna to receive the broadcast. The only contention, and the only issue, is the public's right to receive broadcasts off the air with the assistance of their own antenna, a cooperative antenna, a master antenna or CATV.

Respondent recognizes the decisions holding that the authorized sale of the patented article exhausts the patent monopoly with respect to that article, and holding that the same is true under the Copyright Act with

respect to the sale of a copy of a book, but respondent denies any applicability of that principle to the situation where the copyright owner *licenses* a broadcast. Res. Br. 40-41. Respondent is wrong, however, in thinking the difference between a sale and a license to be a difference of substance in this context; it is merely one of form and method. When the copyrighted article is a book, the nature of the medium is such that the normal method of release to the public consists of the sale of copies. When it is a television motion picture of the kind involved here, the normal method of release is through the licensing of broadcasts. The controlling principle does not reside in the nature of the respective media or in the different methods of utilization thereof by the copyright owner. The controlling principle is rooted, rather, in the *public policy* considerations that, once the copyright owner has been rewarded for releasing to the public (by whatever appropriate means) a particular embodiment of his work, the primary policy of the Copyright Act—the policy of obtaining for the public the benefits of authors' works—applies to prevent the monopolist from imposing a further restriction on the public's enjoyment of that particular embodiment (whether by resale of the copy of the book, or by reception of the broadcast). Only by disregarding the public interest lying at the heart of the Copyright Act, and manifest in the implied-license cases, can respondent take the position that its act of licensing a television station to broadcast to the public confers no right on the public at all.[27]

[27] Respondent states "To license another to perform a copyrighted work 'publicly', or 'in public', is not to 'release' it 'to the public'. . . . A license is merely a waiver, personal to the licensee, to the extent it provides, of the copyright owner's exclusive right to perform his work in public." Res. Br. 33-34.

The Solicitor General explains his suggestion that the license implied in law to receive broadcasts should be limited to the Grade B contours because a broader license would be inconsistent with the Congressional mandate to "maximize television service through the extensive use of local stations" (Mem. 9); he also argues that a limit to Grade B contours will avoid a diminution of the value of a copyrighted work due to transmissions into a distant market where CATV penetration is "substantial." Mem. 10-11. Neither concern warrants limiting the implied license to the Grade B contour. The regulatory scheme of the F.C.C. deals with these concerns in the carriage, non-duplication and distant signal rules.[28]

With respect to small communities (in the category the Solicitor General calls "unserved and under-served areas" (Mem. 17)) beyond the Grade B contours of a broadcasting station, the Commission commences its discussion of "The Major Market, Distant Signal Policy and Procedure" in the *Second Report and*

[28] The F.C.C.'s regulations deal with situations where there may be substantial "CATV penetration" of distant markets. As the Solicitor General notes, the F.C.C. has ". . . adopted a distant-signal rule applicable to CATVs in the top 100 television markets, which again is geared to the Grade B contour concept and which prohibits the extension of signals beyond a station's Grade B contour into one of these major markets except after an evidentiary determination in each case that such extension would not be detrimental to local television service in the affected area." Mem. 13. The regulatory scheme adopted by the Commission also protects stations in markets below the top 100 markets, as the Solicitor General's Memorandum also makes clear. *Ibid.* Of course, the Commission also regulates all microwave use by CATV.

A number of the amicus briefs refer to reception of broadcasts of educational stations by CATV. The F.C.C.'s CATV carriage and non-duplication rules apply to both commercial and educational stations.

Order with the following description of CATV's contribution to the public interest (¶ 139):

> "We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services."

Thus adoption of the Solicitor General's limitation would restrict CATV in an area where CATV makes an "important" and "significant contribution."

The Solicitor General suggests that an advertiser may not intentionally buy coverage in these small distant communities. Even assuming this to be true, it should not be controlling here. The right of the public to receive broadcasts is not based on whether an advertiser may want to reach a particular audience among those who can receive the broadcast off the air, but upon the public policy underlying the Communications Act and the Copyright Act. Members of the television viewing public in these communities also purchase products advertised on television and participate in the economic system which provides advertising revenues and the copyright royalties. To deny an implied license to persons living in the small underserved communities beyond the Grade B contour is to impose an additional charge upon them, which is discriminatory and not warranted or justifiable under the economic scheme supporting the American system of

broadcasting or by the Communications and Copyright Acts.

Implying a license to receive broadcasts in the station's Grade B contour accomplishes, as the Solicitor General notes, the harmonizing of the Federal Communications Act, the antitrust laws and the copyright law. Mem. 6-7. However, the "coalescence" (Mem. 16) of the policies of these statutes is still only partial. In addition to the Communications Act considerations discussed above, there is surely still a "potential for monopolization" (Mem. 6) by reason of the copyright owner's control over CATV for reception off the air outside the Grade B contour, which is common to a great many CATV systems. In five out of ten station-contour situations petitioner's off-the-air reception is in the Solicitor General's infringing category, as they are located shortly beyond the B contour. The B contour does not mark the boundary where reception off the air is possible; at the same time, where there is no microwave (and there is none involved here), reception off the air near the B contour is in the general area the station serves and involves only a minor extension beyond the B contour. Accordingly, the license implied in law should encompass all off-the-air reception.

3. Respondent's attack on the Solicitor General's conclusion that there is an implied-in-law license turns on the premise that the issue before the Court arises only under the copyright law and that there is no relevant policy of the Communications Act to be considered. Respondent asserts that regulation of CATV by the F.C.C. is "grounded on no communications need, and has no purpose other than to remedy the unhealthy consequences of the inability, up to now, of copyright owners to enforce copyright policy with regard to

CATV." Res. Br. 57. The F.C.C. and every government official who has considered this matter disagrees.[29]

The F.C.C. in issuing its regulations concluded that CATV contributes significantly to the nationwide plan for TV service. The "goal" in issuing the CATV regulations was "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (§§ 1 and 303(g) of the Act), both those who are cable viewers and those dependent on off-the-air service."[30] The affirmative contribution of CATV to communications policy was described in the *Second Report and Order* (¶ 139):

> "In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest 'in the larger and more effective use of radio.'"

This conclusion was underlined by the F.C.C. in its decision in *In re Shen-Heights TV Assoc.*, Docket Nos. 17391-94 (released Feb. 23, 1968), where it said (¶ 10):

> "Underlying the entire Second Report are the allocations considerations embodied in Sections 307 (b); 303(h) of the Act. We have a nationwide plan for TV service. *CATV can and does con-*

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[29] The F.C.C. of course has not "announced"—as respondent extravagantly states (Res. Br. 57, see also *id.* at 59)—that the communications policy with regard to CATV "is wholly subordinate to copyright policy." Nor would the F.C.C. have authority so to rule.

[30] *Second Report and Order*, ¶ 47.

tribute significantly to fuller effectuation of that plan." (Emphasis supplied.)[31]

The Solicitor General favors a construction which "harmonizes" and brings about a "coalescence" of copyright policy, communications policy and antitrust policy. The Register of Copyrights, speaking of a proposed copyright bill, stated that CATV copyright liability "is the only major issue that is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications in this country for years to come."[32]

4. In its attack on the Solicitor General's recommendation for a license implied in law within the Grade B contour, respondent argues that the "economic realities" point to the license implied in law "as being 'appropriate' only in some never-never land, in the world of make-believe." Res. Br. 64. The F.C.C.[33]

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[31] The Commission also stated (¶ 10):

"... CATV, as a concomitant to extending the service area of stations beyond their Grade B contours (or changing the nature of service from little watched Grade B to principal city service), can be subjected to a reasonable requirement that it also promote the 'public interest in the larger and more effective use of radio' in this respect. That is what the carriage and nonduplication rules do. . . . '[T]he requirement for carriage of local stations, in a very real allocations sense, furthers our responsibility to prescribe the areas to be served by television broadcast stations (Section 303(h) . . .'."

[32] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 10.

[33] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 79-80.

and Columbia Broadcasting System[34] do not see it as "make-believe" that a copyright proprietor can reasonably expect to be fully compensated by the royalties he receives from the broadcasting station for all viewing within the normal coverage area.[35]

Respondent now criticizes the Solicitor General for accepting these economic facts of television[36] and concluding from those facts that a license implied in law in the Grade B contour cannot have a "substantial adverse impact on the incentive to create . . . ." Mem. 11. Respondent argues that supply and demand "in the market where the licensee broadcasts" determines the royalties, and makes the startling statement that (Res. Br. 62):

> "First, the royalty for a license to broadcast a copyrighted motion picture is *not* calculated on the basis of the size of the television station's audience, or the amount of its advertising revenues. . . ." (Emphasis in the original.)

In fact, royalties are generally related to the size of the licensed station's audience and in some cases are specifically "calculated" on the station's income from

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[34] *Id.* at 220.

[35] Petitioner's offer of proof on television economics (A 1321-24) is discussed in its main brief at pp. 15-16, 90-94.

[36] Respondent's position has been that the "economic realities" are irrelevant to the issues before this Court (A 1313-15), that copyright can be exercised by the proprietor "at his pleasure and exclusively for his own profit" (Res. Br. 64, quoting from *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 130 (1932)), and that "it makes no difference how much the copyright owner collects, whether once, or twice, whether much or little, so long as it is acceptable to him." (Brief for Plaintiff-Appellee in the United States Court of Appeals for the Second Circuit at 93.)

advertising.[37] In its complaint respondent has asserted that the amount of license fees "depends to a large extent on the size of the television audience for said motion pictures in the local coverage area of the licensee, but not outside thereof." A 145. And in answers to petitioner's interrogatories, respondent stated that one of the factors used by its sales department in establishing its price lists was "the size of the potential television audience in the local coverage area" and another factor was the station's "rate cards." R 4038.[38] ASCAP in its amicus brief (at 15) flatly states that "the economics of the performance branch of the entertainment industry are ordinarily geared to apportionment of royalties on the basis of

[37] If respondent's statement were correct, it would mean that the copyright owner granted the license to broadcast the copyrighted work to the station's audience, regardless of the size of the audience. It follows that respondent has been paid for broadcast to the station's audience which has therefore the right to receive, without further payment for that reception. The same conclusion that the copyright owner has been paid is clear in these cases where the royalties are specifically "calculated" on the station's income from advertising and where, as is commonly true, royalties are related generally to the size of the audience.

[38] NAB states (NAB Br. 5) that a broadcasting station's "revenues are obtained from advertising and are large or small depending upon the size of its viewing audience."

Respondent also argues that viewers added by CATV reception within the B contour are insignificant in numbers to a larger market station and thus will not produce any "impact on its advertising revenues." Res. Br. 62. This overlooks the fact that television stations in Pittsburgh, Wheeling and Steubenville (as petitioner offered to prove, A 1323), which would presumably be a much better judge as to what would increase their advertising revenues than respondent, knew of and advertised reception by the public in and around Clarksburg and Fairmont and promoted or solicited carriage by CATV systems and viewing of their broadcasts by subscribers to CATV systems.

the receipts of a particular user. . . . [t]he royalties paid by a commercial broadcaster are related to its receipts from advertisers. . . ." ASCAP and BMI make it plain that their fees are a percentage of the station's gross receipts. Moreover, petitioner offered to prove that respondent itself had licenses with royalties "measured" by the station's income from advertisers. A 1324.

The economics of the television industry demonstrate that a license implied in law for CATV reception would not destroy incentive to create.[39]

III

The Minimum Area of the Public's Right To Receive Is the B Contour

1. The Solicitor General has acknowledged a license implied in law within the Grade B contour of a station, which he states is "the most feasible tool for defining, however roughly, the normal service area . . . ." Mem. 15. However, he would limit this license by what he calls a "*caveat* for special situations." *Ibid.* Using the example of Washington and Baltimore stations where the Grade A contours of the stations in one city cover a part or all of the second city, and the Grade

[39] Between 1956 and 1966 (the period for which figures are available and the principal years of growth of CATV) the amounts paid for programs by the television industry rose from $380 million in 1956 to $1,073 million in 1966. In the same period, the gross revenues of the television industry rose from $896.9 million to $2,203 million. If CATV "inhibited" growth, it is not visible in the figures. (The data are taken from records at the Commission summarized in *TV Broadcast Financial Data—1966,* F.C.C. No. 5317, Public Notice, released August 25, 1967, Tables 1 and 8, and *Broadcast Revenues, Expenses and Income of Television Broadcast Industry—1956,* F.C.C. No. B-49308, Public Notice, released August 22, 1957, Table 5.

B contours encompass and extend beyond the other city, he expresses concern that it "might appear unfair to imply a license to carry copyrighted works licensed to other stations whose Grade B contour includes that area, at least where it can be shown that local and outside stations actively seek exclusive licenses to perform the same works." *Ibid.* He proposes that these situations be decided *ad hoc* on a case-by-case basis, presumably with the result of imposing infringement liability in some cases even though the persons receiving the signals through the CATV systems were within the normal service area (the B contour) of the broadcasting station. We believe that if it should be deemed necessary to fashion a limitation on the license to receive off the air, the minimum area of the public's right to receive is the B contour and that the Solicitor General's caveat does not warrant a further limitation within the B contour.

The Solicitor General proposes that the test be whether it is "unfair" to imply a license without discussing what unfairness he believes relevant. Reference to the Television Factbook, which publishes reproductions of the contour maps of all television stations as filed with the F.C.C., shows that a B contour overlap such as Washington/Baltimore is not an isolated situation. There is a substantial overlapping of many television-station service areas throughout the United States. The F.C.C. considered the problem of overlapping service areas of television stations in the *Second Report and Order* (¶151). After pointing out that under its CATV rules "with possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue" (*id.*), it went on to note (*id.* n. 69) that "if two major markets each fall within one an-

other's Grade B contour (*e.g.*, Washington and Baltimore)", the situation will be dealt with by appropriate petition "in the unusual case where problems of this nature might arise." Thus, the Commission faced and is prepared to deal with the overlap problem (including the specific example) cited by the Solicitor General in the context of the public interest and the place of CATV in the national communications plan.[40]

The Solicitor General does not openly state that the purpose of his caveat is to protect the copyright owner's (or the station's) desire to exploit the copyright by a system of exclusive licenses, but that is the inference from the Memorandum. It is difficult to believe that the Solicitor General gave full consideration to the consequences of this use of exclusivity contracts.

The NAB argues strongly for exclusivity and a consideration of its position shows the serious monopolistic consequences of the adoption of the caveat. The NAB professes concern with the injury it alleges is inflicted by CATV when "the local station has paid for exclusive performance rights in its service area and finds its audience dissipated because a CATV system imports and distributes the same program." NAB Br. 30. It claims injury "whether the invaded area is adequately or inadequately served . . . ." *Id.* at 31. But the F.C.C. in its coverage and non-duplication rules gave stations the degree of exclusivity which the Commission concluded was in the public interest. It is apparent that the NAB's complaint is that the F.C.C. is not according the broadcasting industry the full degree of protection from competition that the stations would like to have. The broadcasters wish to be left

[40] Overlap was, of course, an issue before the F.C.C. in the *Southwestern Cable Co.* cases, Nos. 363 and 428, this term, assigned for argument with this case.

free to negotiate with the copyright industry exclusivity provisions of such scope as to eliminate reception of competing broadcast signals in their claimed service area.[41] Absent some restraining influence, this is precisely what would happen.

The license agreements entered into with film suppliers often give television broadcasters the rights to film "packages" sometimes containing hundreds of films for license periods varying up to as much as 5 years for a specified number of runs or for unlimited runs. See A 145-50. If exclusivity provisions in such contracts may lawfully be extended to or construed to apply to reception by CATV, it is within the power of the broadcast industry and/or the copyright proprietors to destroy any CATV system whose presence is thought competitive to a broadcast station or which the copyright proprietor feels may depress the value of a potential license to a station. The antitrust laws would offer little protection if the Court were to approve the right to practice the exclusivity which the NAB and respondent are seeking.

The copyright owner, free to use exclusivity, can be expected to license the highest bidder. The average CATV system with 1350 subscribers at a typical rate of $5.00 per month (annual gross revenues of $81,000)

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[41] The desire of the broadcaster to be free of competition contrasts with the purpose of the Communications Act. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940):

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

has no bargaining parity with television broadcast stations, and stations can be expected to buy exclusive rights in their service areas if such rights are effective to prevent any reception by the public using CATV of the signals of a competing station broadcasting these programs.

It is no answer to say that the copyright owner will not permit the destruction of CATV systems since they are potential licensees. Notwithstanding the efforts of NAB and other amici to paint CATV as a giant industry threatening the destruction of television broadcasting as it is known today, the facts are that the industry, as the Solicitor General noted (Mem. 7 n. 4), is "relatively diffuse." It is basically a small-town business.[42] These small systems do not have the economic potential to bid against a television station with its enormous audience which wishes to hold a service area free or nearly so from the competition of the signals of other stations.

In the past the Commission has had to step in and limit the unfettered use by the networks of the sword of exclusivity to cut off competitive services which would "deprive the listening public of many programs that might otherwise be available."[43] The Commis-

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[42] See amicus brief of National Community Television Association, p. 6. Even under the prediction for the growth of CATV quoted by respondent (Res. Br. 73), the average annual gross of the systems in 1985 would only be approximately $100,000 per system.

[43] See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 200 (1943). By its Chain Broadcast Regulations adopted in 1941 and subsequently made applicable to television (47 C.F.R. ¶ 73.658), the F.C.C. prohibited stations from entering into contracts with networks pursuant to which stations were bound not to broadcast programs of any other network and which prevented the network from licensing a station other than its affiliate to broadcast a program rejected by the affiliate. The Commission's jurisdiction to adopt such rules was affirmed by this Court.

sion has dealt with the matter of exclusivity which concerns the Solicitor General; its carriage and nonduplication regulations, which give a degree of exclusivity to the local stations, "represent a fair balancing of the competing interests [broadcast and CATV], and properly accommodate both industries and thus, the public interest 'in the larger and more effective use of radio' . . . ." [44]

The "coalescence" of copyright, communications and antitrust policy which the Solicitor General sought by acknowledging a license implied in law would disappear in the inundation of suits to decide what restrictions should be imposed on the public at the behest of a copyright owner or the station who concludes that reception by the public is "unfair" because he believes that larger profits would be possible by practicing exclusivity. The rights of the public should be paramount, and no argument for private regulation by exclusivity contracts justifies imposing a limitation on the public's right to use whatever antenna it chooses in order to receive broadcasts within the B contour.

2. The NAB attacks the Solicitor General's acknowledgment of the license in law in the Grade B contour. In support, it seeks to give the impression that a spokesman for the National Community Television Association acknowledged that reception by a CATV system within the Grade B contour is unfairly injurious to a copyright owner by commencing a quotation with the words "in this situation" without identifying the situation. NAB Br. 29. Even a cursory reading of the testimony makes it abundantly clear that the "situation" to which the spokesman was addressing

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[44] *Second Report and Order*, ¶ 109.

his remarks related solely to "distant stations," *i.e.*, "where a CATV system is located beyond the normal reception range of a television station [Grade B contour] [and] carriage is not compulsory under the Commission's rules." [45]

F.C.C. Chairman Hyde's remarks and the letter of the Commission from which the NAB selectively quoted (NAB Br. 44) were also addressed to the same legislative proposals which provide for exemption from copyright liability within the B contour (subject to certain exclusivity provisions).[46] In the same hearings, Chairman Hyde explained the Commission's views regarding reception within the B contour:

> "I particularly mentioned the circumstances where a community antenna would serve entirely as a community antenna service, simply improving the delivery of the signal within the normal service area of the station. In such an area, the station would have purchased copyright privileges, and the improvement in its delivery would not seem to justify the addition of another charge.

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[45] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 87. Even with regard to this "distant station" situation, the spokesman urged, "[n]evertheless, there are policy considerations which dictate that under certain conditions a license should be compulsory with provisions for a reasonable license fee defined by statute," and referred to underserved areas. *Id.* at 87. Moreover, this entire discussion was in the context of "proposals" for a legislative solution which would "represent a fair accommodation of the interest of the viewing public and the private interests of the copyright owner." *Id.* at 86.

[46] In the same context the NAB quotes (NAB Br. 43) from a part of the *Second Report and Order* regarding the F.C.C. decision to suggest that Congress consider extending § 325(a) (consent required for rebroadcasting) to CATV without noting the F.C.C.'s conclusion: "We are not in a position to state whether a Section 325(a) approach would be effective and *fully consistent with the public interest.*" ¶ 153(iii) (emphasis supplied).

> "Well, actually what our regulations do is require that the local CATV system perform the function of a CATV system and carry the local station signals. Actually, in requiring the CATV system to carry the local stations' signals, we are simply requiring of them that they perform an antenna service, not a distribution service. We do not believe in these circumstances that an additional copyright payment would be required." [47]

A similar statement appears in the letter from which the NAB quotes.[48]

The conclusion that the entire predicted B contour area is the station's normal service area and that there is no justification for limiting the license implied in law to receive within the B contour is underlined by the F.C.C.'s recent decision in the *Shen-Heights TV Assoc.* case, *supra* p. 25. The Commission held that

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[47] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 80.

[48] The letter of the Commission on H.R. 2512 referred to by the NAB (NAB Br. 44) contains the following paragraph on reception within the Grade B contour:

> "*Local signals.*—CATV systems would be exempt from copyright liability to the extent that they carry signals within the Grade B contour, unless carriage of the signal, with respect to particular programming, conflicts with a local broadcaster's exclusive rights in the area as to such programs (see subparagraph 3 below). This exemption for local signals accords with the Commission's carriage rules and indeed would be an incentive for the CATV to carry the local station. It permits CATV to bring programs already paid for by the local station to persons within the prescribed service area of that station, while at the same time, it helps remedy those situations where because of terrain or for other reasons, good reception of the local signal throughout the station's prescribed coverage area is not possible." *Hearings on Regulatory Agencies before the House Comm on Interstate and Foreign Commerce,* 90th Cong., 1st Sess., Ser. No. 90-1, at 575 (1967).

its CATV rules required carriage by a CATV and non-duplication protection "even though a viewable off-the-air picture is not available in any part of the CATV community . . . ." ¶ 10. The Commission thus views its carriage and non-duplication rules as a significant means of assuring coverage within the station's B contour, thereby fulfilling its allocations policy. The conflict that would exist between a rule of CATV copyright liability and the F.C.C.'s requirement that CATV systems "carry" local stations upon request is brushed aside by respondent, on the apparent basis that the Copyright Act would have to take precedence and the carriage requirement be discarded. Res. Br. 59. The stations that the requirement is designed to aid would thus be sacrificed—and with them the public interest that the F.C.C. has found to be served by the requirement—to the copyright owners' demand for license fees. The Grade B contour has become the area in which the Commission will assure service by requiring carriage by CATV. Since this requirement would be imposed whether or not a signal is available off the air in any part of the CATV community, no justification exists for fashioning a limitation within the Grade B contour.

CONCLUSION

"The overall problem," the Solicitor General states, "is a large one, with substantial ramifications in the fields of copyright policy, communications regulation, and antitrust law." Mem. 1. The F.C.C. has adopted what the court below called "detailed, carefully graduated rules" (A 1366-67) to deal with "the multifaceted and complex" problems raised by CATV (A 1366) and, as Chairman Hyde has said (p. 36 *supra*), the result of the F.C.C. rules is that CATV provides "an antenna service, not a distribution service."

Adopting a novel interpretation of the Copyright Act which extends the copyright monopoly over a new development not contemplated by the Congress will have the anticompetitive consequences which the Solicitor General fears. Private control by the copyright owners will supplant the communications regulation of a governmental agency which can focus on the proper role of CATV in the national television plan. We come back to the principle which the Solicitor General finds established in *White-Smith* where this Court refused to make such an extension of the copyright monopoly—"this Court could hold that until Congress acts specifically it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area." Mem. 7.

The decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

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INDEX

	Page
Motion	1
Brief	4
A. Interest of Amicus Curiae	4
B. Background Information About The CATV Industry	4
C. Question Presented	7
D. Argument	8
I. Achievement Of The Objectives And Public Policy Of The Copyright Act Does Not Require A Finding That CATV System Operation Constitutes An Infringing Performance	8
II. A Judicial Holding That Reception And Transmission By CATV Systems Of Television Broadcast Signals Constitutes A Performance Would Apply Equally To All Master Antenna Systems, Including The Well-known Apartment House Systems In Use Throughout The United States	14
III. A Blanket Application Of The Copyright Monopoly To Reception By CATV Systems Would Have Serious Anticompetitive Consequences One Of Which Would Be To Transfer Ownership And Control Of The Industry To The Large Corporate Copyright Owners	16
IV. The Result Reached By The Lower Courts In This Case Will Deprive Many Persons Of Television Service To Which They Are Entitled Under The Policies Of The Communications Act	22
V. Conclusion	26

TABLE OF AUTHORITIES

CASES: Page

Alden-Rochelle, Inc. v. *ASCAP*, 80 F. Supp. 888 (S.D. N.Y., 1948) 21

Fox Film Corp. v. *Doyal*, 286 U.S. 123, 127 (1932) 8

Lilly v. *United States*, 238 F.2d 584 (4 Cir., 1956) 15

Mazer v. *Stein*, 347 U.S. 201, 219 (1954) 8

Pahoulis v. *United States*, 242 F.2d 345 (3 Cir., 1957) 15

United States v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa., 1960) *aff'd per curiam*, 365 U.S. 567 (1961) 15

United States v. *Loew's, Inc.*, 371 U.S. 38 (1962) 21

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) 8, 22

STATUTES:

47 U.S.C. § 153(o) 26

UNITED STATES SUPREME COURT RULES:

Rule 35 1

Rule 42(3) 1

ADMINISTRATIVE DECISIONS AND REPORTS:

CATV Operational and Ownership Data—1966, F.C.C. Release No. 605, Public Notice G, November 22, 1967 ..... 5, 24

Second Report and Order on CATV, 2 F.C.C. 2d 725, 745 (1966) 6

Sixth Report and Order on Television Allocations, 1 Pike & Fischer R.R. (Part 3) 91:620 (1952) 23

TV Broadcast Financial Data—1966, F.C.C. Release No. 5317, Public Notice, released August 25, 1967, Tables 1 and 8 10

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PROOF OF SERVICE

I, Bruce E. Lovett, one of the attorneys for the applicant, National Cable Television Association, Inc. (NCTA) Amicus Curiae, and a member of the bar of this Court, hereby certify that on the 24th day of January, 1968 I served NCTA's "Motion for Permission to File and Brief Amicus Curiae", by mailing copies thereof in a duly addressed envelope with first class postage prepaid, to all parties on whom such

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Amicus Curiae

OTHERS: Page

Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, U.S. Senate, 90th Congress, 1st Session, *on the Public Television Act of 1967, S. 1160,* p. 678 7

Hearings pursuant to S. Res. 201 on S. 1006 before a Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, 89th Congress, 2nd Session (1966) 9

Hearings on Copyright Law Revision before Subcommittee No. 3 of the House Judiciary Committee, 89th Congress, 1st Session (1965) 19, 24

Hearings on the Use of Ratings in Broadcasting before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Congress, 1st Session, Pt. 1 (1963) 11

N. Johnson, *CATV: Promise and Peril,* Saturday Review, November 11, 1967, p. 37 et seq 6

Journal of the National Association of Educational Broadcasters, March-April, 1964 p. 46 7

D. Loehwing, *How much Interference?,* Barron's, November 13, 1967, p. 3 et seq 6

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Television Digest's CATV & Station Coverage Atlas, 1967-68 Ed., p. 4a 6

Television Factbook, 1967 Ed./No. 37, Stations Volume, pp. 769b-780b 24

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MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42(3) of the Rules of this Court, National Cable Television Association, Inc., (NCTA) respectfully moves the Court to grant NCTA permission to file a Brief *Amicus Curiae* herein on the following grounds:

1. NCTA has requested permission of both parties herein to file a Brief *Amicus Curiae* in support of Petitioner. On October 4, 1967, Respondent United Artists Television, Inc., refused such permission.

2. On October 16, 1967, National Community Television Association, Inc., (NCTA) filed with the Court a Motion and Brief for Permission to File Brief *Amicus Curiae* in support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The corporate name of National Community Television Association, Inc., has been changed to National Cable Television Association, Inc., and the two are one and the same person.

3. By Order of December 4, 1967, the Court granted the Motion of NCTA and in the same Order granted a Writ of Certiorari in this matter, now pending herein on the merits.

4. NCTA is the only national trade association representing the community antenna or cable television industry, which industry will be directly and substantially affected by the final Opinion in this matter. Accordingly, NCTA is vitally concerned on behalf of its members and the public that this Court have before it a complete analysis and argument covering all phases of the public and private considerations involved in the issues presented.

5. The questions presented, among other things, emphasize conflicts created by the opinions below, between national public policies enunicated in the Copyright Act, the Communications Act and the federal antitrust statutes. As an organization representing a substantial part of the CATV industry, NCTA is particularly qualified to aid the Court from an industry-

wide viewpoint, emphasizing the national impact upon television viewing which could result if a proper resolution of the conflicts between these important public policies is not achieved.

6. NCTA believes that the parties, not representing the broad industry view, will present arguments more narrowly aimed at the effects of the ruling on the parties herein and that, because the result will affect an entire industry, NCTA wishes to inform the Court of the CATV industry's views and of the severe impact of the decision on that industry.

7. The policies contained in the Copyright Act, the Communications Act, and the antitrust statutes have a direct bearing on the extension of copyright monopolies, and may be dispositive of the case.

RESPECTFULLY SUBMITTED, this 24th day of January, 1968.

Bruce E. Lovett
Gary L. Christensen
1634 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for National Cable Television Association, Inc., Amicus Curiae

INTEREST OF AMICUS CURIAE

National Cable Television Association, Inc., incorporated in 1952, is the only national trade organization representing the community antenna television (CATV) industry. It represents 885 CATV systems having 1,407,000 subscriber-homes, which is over 56% of CATV-served homes.[1] Among other trade-association activities, NCTA, in conjunction with eight regional and twenty-one state CATV associations, collects and disseminates information of general interest concerning the CATV industry. NCTA has represented the CATV industry in proceedings in the courts, legislatures, and state and federal agencies on problems of an industry-wide nature, and performs a variety of other services designed to assist its members in promoting the development and public acceptance of CATV service.

The opinions of the lower courts have a direct impact on NCTA, and its members, as well as the public which relies upon CATV systems for adequate television reception. NCTA is therefore vitally concerned with the consequences of the rule announced by the lower courts in this case.

BACKGROUND INFORMATION ABOUT THE CATV INDUSTRY

The first commercial CATV systems commenced operation in the mountainous areas of Pennsylvania in the late 1940's. The number of systems grew rapidly

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[1] Assuming an average of three television viewers per television home, over 4 million television viewers are served by NCTA member systems.

during the early 1950's as a result of the Federal Communications Commission's (hereinafter FCC) "freeze" on the licensing of television stations, which lasted from the fall of 1948 to the spring of 1952. Government[2] and NCTA sources indicate that there are approximately two thousand CATV systems presently operating. Data collected by NCTA indicates there are about 1100 additional systems enfranchised but not yet operating, and about 1600 applications pending before municipal and other local agencies for authority to construct new systems.[3] Operating CATV systems now provide service to approximately eight million television viewers in all 50 states.

CATV developed in small communities and non-urban areas in response to public demand from those who were so disadvantageously situated in relation to television broadcast stations by reason of distance or terrain that they received poor signals or none at all, or could not receive a variety of signals. The service achieved particularly swift public acceptance in mountainous areas of the East, and in the West where communities were widely spaced and television stations infrequent. The industry has been recognized by the F.C.C. as having "arisen in response to public need and demand for improved television service" and as performing "public services in this respect." The Commission made it clear that CATV systems "make

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[2] CATV Operational and Ownership Data—1966, F.C.C. Release No. 605, Public Notice G, November 22, 1967.

[3] Since several applications may be pending in the same municipality it should not be assumed that applications are pending in 1,600 additional communities.

important contributions" to the national television system.[4]

The present structure of the CATV industry is predominantly oriented toward small systems in smaller sized communities.[5] The average system has about 3150 subscribers, and employs three persons in addition to the system owner.

In achieving an understanding of the public service the CATV industry performs, its contribution to the country's educational system, particularly in the rural or non-urban area, should not be overlooked. CATV

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[4] *Second Report and Order on CATV*, 2 F.C.C. 2d 725, 745 (1966); see also N. Johnson, *CATV: Promise and Peril*, Saturday Review, Nov. 11, 1967, pp. 37 et seq.; D. Loehwing, *How Much Interference?*, Barron's, Nov. 13, 1967, pp. 3 et seq.

[5] *Size of City*	*Number of Systems in Cities of this Size Category*	*Number of U.S. Cities in Size Category*
1,000,00 or more	1	5
500,000-1,000,000	5	16
250,000-500,000	1	30
100,000-250,000	15	79
50,000-100,000	66	180
25,000-50,000	131	366
10,000-25,000	314	978
5,000-10,000	327	1,282
2,500-5,000	324	1,763
1,000-2,500	320	3,515
Under 1,000	283	9,874
Total	1,787	18,088

Source: Television Digest's CATV & Station Coverage Atlas, 1967-68 Ed., p. 4a. See also, M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, a Report to the Federal Communications Commission*, 1965, at p. 1.

systems have become a significant aid to the distribution of the signals of non-commercial educational television stations to homes and schools.[6] CATV systems now distribute the signals of 73% of the nation's educational television stations to 1,318 elementary schools, 295 junior high schools, 323 senior high schools, 29 junior colleges and 39 universities, having over 940,000 students.[7]

QUESTION PRESENTED

The threshold question presented by this appeal is whether reception of the signals of a television station which is broadcasting a copyrighted program pursuant to a license from the copyright owner and the transmission of those signals in the form of electromagnetic energy to the CATV systems' subscribers, where those signals are converted into the sights and sounds of the program by the subscribers by means of their privately owned television receivers, constitute an infringing public "performance" of the copyrighted work within the meaning of Sections 1(c) and (d) of the Copyright Act. (17 U.S.C. Sections 1 (c), (d)). That the operations of a CATV system do not constitute a performance has been carefully briefed by the Petitioner, Fortnightly Corporation, both in the courts below and for this Court. NCTA will not replow this ground. It supports and adopts the brief of Petitioner in this

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[6] Journal of the National Association of Educational Broadcasters, March-April, 1964, p. 46.

[7] *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, U.S. Senate,* 90th Congress, 1st Session, *on the Public Television Act of 1967, S. 1160,* p. 678.

respect. However, it is believed that supplemental comment will be helpful to this Court with regard to the ruling of the Court below that the CATV reception constitutes performance and of the consequences of such a ruling from an industry-wide point of view.

ARGUMENT

I

Achievement of the Objectives and Public Policy of the Copyright Act Does Not Require a Finding That CATV System Operation Constitutes an Infringing Performance

The public policy of the Copyright Act is twofold. Its fundamental purpose is to induce authors, composers and artists to release to the public the product of their creative genius.[8] Reward to the copyright owner, although an important consideration, is secondary to that primary purpose.[9] However, both objectives are met with respect to CATV reception of authorized broadcasts without the extension of the monopoly to CATV. The economics of television broadcasting have functioned well to induce the artists as well as the large corporate copyright holders to release their works to the public through the medium of television broadcasting. As a practical matter, it cannot reasonably be contended that CATV, operating within the framework of the television industry as it has for the past 17 years without paying copyright royalties, has had an adverse

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[8] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). See *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932).

[9] *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

impact upon the implementation of the public policies of the Copyright Act.[10]

It is noteworthy in this connection that the television broadcasting industry had income before federal in-

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[10] See the testimony of the Antitrust Division, Department of Justice before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U.S. Senate, 89th Cong., 2nd Sess. in *Hearings pursuant to S. Res. 201 on S. 1006*, a bill to provide for general revision of the copyright laws, (1966) at 214:

> "In a more practical vein, it is argued that copyright liability for CATV's is needed to provide a basis for compensating the copyright holders, and thus to encourage them to create programs. We note, however, that up to now the television broadcasting industry has had no difficulty in obtaining programing material, and paying for it through the sale of advertising—and this despite the growth of a CATV industry which has not paid copyright royalties and has not been otherwise restricted by copyright holders. Indeed, there is little reason to think that injury to copyright holders should have resulted from CATV expansion. A CATV system increases the number of viewers of a station. Since the advertising sponsors who bear the cost of television programing pay the station a fee which usually increases as the size of the audience grows, the existence of CATV transmission should increase the amount paid by sponsors and this should increase the royalties paid for the programs even though the CATV system itself pays no royalty.
>
> ". . . Finally, while we believe that the factual questions involved in estimating the possibility of disincentive effects on copyright holders are difficult and merit the careful examination and evaluation of the committee, we also believe it probable that in the long run the stations transmitted over CATV should be able to adjust advertising rates, and pay more for programs, according to their new widespread audience. For this reason, allowing CATV systems to retransmit television programs royalty free may not decrease significantly the amount of money paid to copyright holders."

come taxes in 1966, of 492.9 million dollars after deducting from gross income all expenses including over 1 billion dollars in program expenses.[11] In 1960, the year this action was instituted, the television industry had gross revenues in excess of 1.2 billion dollars and income before federal income taxes, after deduction of all other expenses, of $244.1 million.[12] Official figures released by the Federal Communications Commission show continuous and substantial annual increases in income before federal income taxes from 1956 continuing through 1966 (the latest reported year).[13] The spread between income and expenses has been increasing over the years.[14]

It may not be fairly said that subscribers to CATV systems have not made a fair and pro rata contribution to the 2.2 billion dollars of gross income received by the three television networks including their owned stations and the 593 other stations during 1966.[15] This may be clearly demonstrated by the economics of televi-

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[11] TV Broadcast Financial Data—1966, FCC No. 5317, Public Notice, released August 25, 1967, Tables 1 and 8.

[12] *Id.* Table 1.

[13] *Ibid.*

[14] *Id.* Chart, p. 2.

[15] Total time sales by the networks and the 608 television stations (including the network owned-stations) exceeded 1.8 billion dollars in 1966. *Id.* Table 1A, Table 3, lines 5 and 7.

sion broadcasting.[16] The principal source of revenue to finance the television industry is from time sales to advertisers or sponsors.[17] These revenues are used, in part, to defray the cost of acquiring programs.[18] Station and net work rates charged to advertisers are influenced by the size of the station's and network's audiences (circulation) during a given time or program period.[19] A station's network rate (the rate paid by the network for time on the station) is also determined in relation to the size of the station's circulation.[20] Circulation or audience estimates are used in soliciting new business from advertisers and

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[16] The economic system under which television broadcasting operates, as set forth herein, is described in sworn testimony of three top network executives and the President of the National Association of Broadcasters (NAB) in *Hearings on the Use of Ratings in Broadcasting before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 1st Sess. Pt. 1 (1963). The executives were Thomas W. Moore, Vice President in Charge of Television of ABC Television Network at pp. 65-73; Mort Werner, Vice President in Charge of Programs for the NBC Television Network, at pp. 75-138; James T. Aubrey, Jr., President of CBS Television Network at pp. 32-54. The testimony of the President of the NAB (unsworn by oversight), appears at pp. 3-32. Citations to this testimony will be by name of witness and to the page.

[17] *Supra* note 16, Table IB; Aubrey, *supra,* note 16 at pp. 33, 35-6. pp. 35-6.

[18] *Ibid.*

[19] Aubrey, *supra* note 16 at p. 34: "The pricing of network time to advertisers is influenced by audience size. Since potential audiences vary by time of day, varying prices are charged for different time segments of the day."

[20] Aubrey, *Id.* at 34, 36; Moore, *supra* note 16 at p. 68; Werner (Adams), *supra* note 16 at pp. 118-19.

maintaining existing business.[21] Audience estimates are also relied on heavily by advertising agencies in purchasing television time.[22] Advertisers are vitally interested in the size of the audience to which their commercial messages are exposed.[23] Normally, television advertisers seek the largest possible audience or circulation.[24] The most common yardstick which advertisers may use to evaluate their purchases of television time is the cost per thousand of the viewing homes.[25] Thus the entire economic system of television is founded on advertiser payments to the stations and networks and the amount of those payments is geared to the size and composition of the audiences provided.

The audience estimates or circulation used by the stations, the networks and advertisers, are based upon measurements conducted by so-called rating services. There are several organizations providing rating services; however, the two principal ones are A. C. Neilsen

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[21] Aubrey, *Id.* at p. 34; Werner, *Id.* at p. 76. See also p. 81 where Mr. Werner stated:

> "Television is not only a program service but an advertising medium which operates in a framework of intense competition. The principal value television has to offer an advertiser is audience, and the rating services furnish us and our advertisers with the measurement of the audience generated by our programs. This is a business requirement of broadcasting, essential in soliciting and justifying the advertising expenditures that support our program services."

[22] Aubrey, *Id.* at pp. 33-5, 37 (Sparger); Collins, *supra* note 16 at p. 6.

[23] *Id.* at p. 33.

[24] *Id.* at p. 35.

[25] Moore, *supra* note 16 at p. 67.

Company and the American Research Bureau (ARB).[26] The sampling methods and techniques of both of these companies are so designed as to include all television viewers in the audience of the particular television station they are viewing, whether they utilize the services of CATV systems or other master antenna systems, or any other type of antenna. Thus, television viewers utilizing CATV, as part of a station's circulation, influence in the same manner as any other television viewers the station's and network's rates to and income from advertisers and are part of the audience for which the advertiser pays.

The costs of advertising are, of course, included in the cost of the product advertised. To the extent that television viewers succumb to the blandishments of those who advertise on television and purchase the advertised products, they provide the revenue to advertisers which they, in turn, use to purchase time. Members of the public who view their television through connections to CATV systems are subject to the same advertising messages as those who utilize other antennas, and accordingly, in general make the same contribution to the advertiser as other television viewers and, thus pay their share of the revenue available to the station for acquiring program rights. The subscriber to a CATV service—who has paid his share and played his part in the economic system that supports television—should not be required to make a second payment to the copyright proprietor through his CATV subscription. The Department of Justice addressed itself quite specifically to this point in its testimony before the Senate

[26] Testimony of Moore, Aubrey and Werner, *supra* note 16.

Subcommittee on the legislative proposal which would have applied copyright liability to CATV systems.

> "Finally, the CATV liability here proposed would in fact be a departure from the system by which copyright holders are now compensated. Generally speaking, the television viewer in effect now pays for the television programing indirectly, by buying the products of the sponsors, since the sponsors' payments for advertising include royalties for the copyright holders. We do not believe that the television viewer via CATV should in addition, make direct royalty payments to the copyright holder through his CATV subscription and, indeed, think it may be inequitable to require him to do so. To summarize, it is far from clear that the case for the blanket copyright liability has been made in terms of its necessity as an incentive to creation, and some inequitable treatment of CATV viewers may well result. *For these reasons, we do not believe that copyright policy necessitates the proposal here made.*" (Emphasis supplied.) *Hearings on S. 1006, supra* note 10, at 214-15.

II

A Judicial Holding That Reception and Transmission by CATV Systems of Television Broadcast Signals Constitutes a Performance Would Apply Equally to All Master Antenna Systems, Including the Well-Known Apartment House Systems in Use Throughout the United States

If, in fact, the Petitioner's CATV systems "perform" in providing antenna services to their subscribers, then all apartment house owners utilizing master antenna systems to serve the tenants and residents of those apartments, are likewise and equally engaged in "performing" copyrighted works. That CATV systems are technically and functionally anal-

ogous to master antenna systems used in apartment houses is a fact supported by decisions of the courts and by the record herein. In fact, community antenna equipment was originally adapted from master antenna systems used in dealers' show rooms and apartment houses. This technical relationship was explored at length and findings of fact confirming the relationship were made by the U. S. District Court for the Eastern District of Pennsylvania in 1960.[27] There being no functional or material technical distinction between CATV systems and master antennas commonly used in apartment houses throughout the United States, it follows that if a CATV system performs under Sections 1(c) and (d), then all apartment house and master antennas perform in the same manner. Since such systems produce a financial or commercial advantage to apartment house owners the alleged "performances" would be for profit. Nothing in the decisions of the courts below allows for an exception for such master antenna systems and the facts permit no valid distinction. If the decision below is affirmed, any apartment house owner who provides a master antenna service for the convenience of his tenants would be an infringer subject to the same liabilities as a CATV operator and the costs of copyright royalties and negotiating clearances obviously would be passed on to the tenants in the form of rent or special fees, or in the alternative, the

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[27] *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960) *aff'd per curiam*, 365 U.S. 567 (1961); *cf. Lilly* v. *United States*, 238 F.2d 584 (4 Cir. 1956) and *Pahoulis* v. *United States*, 242 F.2d 345 (3 Cir. 1957). The Petitioners's equipment and the systems were built by Jerrold.

antenna service would be discounted.[28] The Copyright Act could never have been intended to and should not be construed to produce such absurd consequences.

Reception and transmission of electromagnetic energy (broadcast signals) rationally cannot be and is not, in and of itself, a "performance" within any reasonable construction of the word as a matter of simple English or as a word of art. The results of such a forced construction of "performance" are far-reaching, incongruous and create an unwarranted discrimination between persons residing in the same area who desire to use master antennas and those using individual antennas.

III

A Blanket Application of the Copyright Monopoly to Reception by CATV Systems Would Have Serious Anticompetitive Consequences One of Which Would Be To Transfer Ownership and Control of the Industry to the Large Corporate Copyright Owners

Neither the language of the Copyright Act nor anything in its legislative history requires the interpretation of "performance" reached by the courts below.[29] Accordingly, in determining whether the Court should uphold a judicial application of the copyright monopoly

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[28] It cannot be assumed that copyright proprietors would voluntarily waive royalties from apartment house services. Large apartment complexes in major cities may have more tenants than some CATV systems have subscribers.

[29] Opinion of Court of Appeals (Appendix to the Record herein, 1343-67); 377 F.2d at 876. The District Court also recognized that the word "performance" in its ordinary sense does not include CATV reception. (Appendix 67), 255 F. Supp. at 201.

to CATV reception, it is appropriate to consider public policies arising under other federal statutes. Since the national public policy is opposed to monopoly, the anticompetitive consequences of a judicial extension of the copyright monopoly warrant careful consideration. They are such in this case as to require a conclusion by this Court that the monopoly not encompass CATV activity.

The United States Department of Justice has taken the position in testimony presented before a Senate Subcommittee on a bill providing for general revision of the Copyright Act that a legislative extension of blanket copyright liability to CATV would have serious anticompetitive consequences.[30] The views of the Department have been quoted by Petitioner. NCTA supports the position taken by Petitioner, but believes that it can assist the Court in evaluating the anticompetitive risks of affirming the rule announced by the court below by analysis of some CATV industry statistics recently released by the Federal Communications Commission. Relation of these statistics to obvious economic facts about the CATV industry and to the recognized problems of clearing licenses for CATV will demonstrate that the only manner in which the reception service provided by CATV and other master antenna systems could survive a blanket application of the copyright monopoly to such operations would either be to surrender ownership and control to the large copyright proprietors or to negotiate for overall clearances with a now nonexistent organization which would

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[30] *Supra* note 10 at 211-15.

have to be established to represent all copyrights on television.

The F.C.C. recently released a compilation of CATV Operational and Ownership Data—1966, based upon returns of F.C.C. Form 325, filed by 2246 CATV systems. This represents a substantial majority of operating CATV systems. Approximately one-half of these systems have less than 500 subscribers; in excess of 60% have less than 1,000 subscribers.[30a] If it be assumed that the monthly charge of each system is $5.00,[31] a system having 1,000 subscribers has $5,000 per month or $60,000 per year to pay all usual operating expenses, to amortize equipment costs and loans, as well as to cover the costs of negotiating clearances with copyright owners and to pay the copyright fees, unless charges to subscribers are raised.

Considering that the CATV operator must deal with the major networks and the major film syndicators and distributors, this is little to work with. While we do not know how many owners of copyrighted television programs there are, the number must be very substantial. Mr. Arthur B. Krim, President of United Artists Corporation, Respondent's parent, testified in hearings before a House Subcommittee on general revision of the copyright law that he spoke there on behalf of 14 major companies which represented 75%

[30a] *Supra* note 2, Chart 3.

[31] The records of NCTA indicate a range of monthly charges from $3.50 to $8.00. The monthly rate for the majority of systems ranges between $4.50 and $5.00. The record shows that the Petitioner's monthly charge was $3.75.

of "the copyrighted material on the airwaves today." [32] He estimated that another 14 might represent 100% of such material. We doubt this and believe the figure to be much higher. In any event, the CATV operator would have to bargain with 25 or more major syndicators and three television networks, not to mention the music performing societies such as ASCAP, BMI and SESAC, Inc.[33] Moreover, he would have to be alert to the possibility of occasional broadcasts of programs owned by lesser known or obscure copyright proprietors.

There exists no machinery such as an ASCAP through which the CATV operator may bargain with the numerous copyright proprietors for blanket advance clearances. The system operator can know the copyright proprietors with whom it must bargain no earlier than the stations the system receives choose to announce their program schedules. Thus, the system is subject entirely to the station's schedule for advance warning as to those copyright owners whose permission it would need to obtain. Moreover, since the typical system will receive five different stations,[34] it will have to be concerned with clearances on five different program schedules, and all only after securing information identifying the program suppliers when the stations

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[32] *Hearings on Copyright Law Revision before Subcomm. No. 3 of the House Judiciary Comm.*, 89th Cong., 1st Sess., p. 1332 (1965).

[33] American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and Society of European Stage Authors & Composers, Inc.

[34] Seiden, *supra* note 5 at p. 54.

announce their schedules. The average small system (as well as a large majority of the country's CATV systems) will not be in a position to negotiate advance clearances in time to continue its reception service, even if it had the necessary funds to pay the costs of such last minute negotiations.[35] Thus, as a practical matter if service is to continue, negotiations will usually follow reception and consequent infringement, and the CATV system will have the choice of acceding to the copyright proprietors' demands or litigating damages. Where the claimed statutory damages were large, it is easy to see how the larger copyright proprietors and networks would end up owning the CATV industry.[36]

In addition, it should be noted that a CATV operator does not pick and choose his programs. He is not a

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[35] It is common knowledge that last minute changes occur frequently in television station program schedules. It is manifestly impossible for a CATV operator (since he is not the originator of the broadcasts) to anticipate such program changes and make advance clearances. Thus he is constantly faced with the hazard of innocent infringements and harassing litigation.

[36] Consideration of the enormous potential liability for past damages under the three year statute of limitations also makes it clear that the only manner in which such back liabilities could be discharged would be to turn the systems over to the copyright owners. A five-channel system receiving five stations will receive 1,500 or more programs a week. Assuming that only two-thirds of these are copyrighted, systems would infringe as many as 1,000 programs per week. At statutory damages of $250.00 per infringement, damages for such a system would total $250,000 per week or 1 million dollars per month. This amount will exceed the value of any CATV system. CATV, if only a fraction of these damages were assessed, could continue only if owned and controlled by the networks and the major non-network copyright proprietors.

program originator with the opportunity of negotiating with alternative program sources. He must pay for whatever the station chooses to broadcast, or else eliminate reception of that station's programs. Absent an automatic or compulsory license for CATV established pursuant to legislation, the large majority of systems would not have the capability to bargain and would either have to accept the terms imposed by the copyright proprietors, violate the law or cease operation.

It seems obvious that the CATV industry's only possible solution to the copyright clearance problem, if it is to be brought within the monopoly by judicial rule, is the creation of a new performing rights society (such as ASCAP) which could blockbook and negotiate overall clearances. As has been demonstrated above, independent CATV could not exist if individual clearances on each program had to be negotiated with each separate copyright proprietor. But establishment of such an overall clearance mechanism raises difficult problems under the antitrust laws. *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948); *cf. United States* v. *Loew's Inc.,* 371 U.S. 38 (1962). And such a new combination of copyright proprietors would obviously have life-or-death power on CATV, and, unless subject to court control like ASCAP, could easily take over the CATV industry.

The result reached by the courts below produces a situation in which the complete takeover of the CATV industry by the major copyright holders, and particularly the networks, appears probable. Such a concentration of control of production and public access to

copyrighted television programs is comparable to the situation struck down by this Court in the motion picture industry in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

In the face of the severe anticompetitive consequences which will flow from the rule, NCTA submits that the copyright monopoly should not be interpreted to cover a reception service such as CATV unless it is crystal clear that Congress intended such a result.[37]

IV

The Result Reached by the Lower Courts in This Case Will Deprive Many Persons of Television Service to Which They Are Entitled Under the Policies of the Communications Act

The public policy of the Communications Act would be offended and hundreds of communities could be deprived of a large part, if not all, of their television by a blanket extension of the copyright law to cover CATV operation. The public interest in extending the educational and entertainment benefits of television to all of the people of the United States is so obvious as to require no discussion. The Sixth Report and Order of the Federal Communications Commission establishing the Table of Television Channel Allocations throughout the country was founded upon a system of priorities intended to provide television service ". . . as far as possible to all of the people of the United States and to provide a fair, efficient and equitable distribution of television broadcast stations to the

[37] See discussion *supra* p. 16.

several states and communities."[38] Population was a principal consideration bearing on the distribution of assignments, and as a result the larger cities were assigned multiple channels and the smaller cities were limited to one or two channels; many were assigned no channels at all.[39]

It was the inadequacies of these assignments together with the inability of many cities and towns to provide adequate economic support for a television station which were primarily responsible for establishment and growth of the community antenna television industry.[40] The most persuasive evidence of this fact is that 1623, or almost 75% of 2246 systems reporting to F.C.C., are in towns of less than 10,000 people, and more than 50% of the systems reporting have less than

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[38] *Sixth Report & Order on Television Allocations*, 1 Pike & Fischer R.R. (Part 3) 91:620 (1952). The priorities were:

"(1) To provide at least one television *service* to all parts of the United States.

(2) To provide each community with at least one television broadcast *station*.

(3) To provide a choice of at least two television *services* to all parts of the United States.

(4) To provide each community with at least two television broadcast *stations*." (Emphasis supplied)

[39] *Id.* pp. 91:621-25.

[40] M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, a Report to the Federal Communications Commission*, at 1, 18, 23 (1965).

500 subscribers.[41] CATV systems are the means whereby these communities originally were enabled to enjoy the services of the three national television networks. In more recent years, the programs of non-network and educational stations are also enjoyed by these communities by reason of the service provided by CATV. Thus, the residents of the smaller communities have been enabled to become first class television citizens with the same, or nearly the same, opportunities to enjoy the entertainment benefits of television as the large metropolitan areas.

In this regard, it is instructive to consider the available television in West Virginia, where the petitioner's CATV systems are located. The entire state has only nine operating television stations.[42] Thus the many CATV systems in this state[43] are highly important to

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[41] *Supra* note 2, Charts 2 and 3.

[42] WHIS-TV, Bluefield; WCHS-TV, Charleston-Huntington; WHTN-TV, Huntington-Charleston; WSAZ-TV, Huntington-Charleston; WBOY, Clarksburg; WOAY-TV Oak Hill; WTAP-TV, Parkersburg-Marietta, Ohio; WDTV, Weston-Fairmont; and WTRF-TV, Wheeling, *Television Factbook*, 1967 Ed./No. 37, Stations Volume, pp. 769b-780b.

[43] Data released by the F.C.C. show 92 reporting CATV systems in West Virginia. *CATV Operational and Ownership Data, supra* note 2, Chart 3. However, there are probably many more systems in West Virginia than reported to the F.C.C. Testimony to a House Subcommittee was that "there were more than 40 community antenna systems" in Marion County, with the number of homes using a specific system varying "from less than 50 to thousands." There was also "a cooperative system which has approximately 600 connections." *Hearings on Copyright Law Revision before Subcomm. No. 3 of the House Judiciary Comm.*, 89th Cong., 1st Sess., 1288-1289 (1965). Petitioner's Fairmont system is in Marion County.

the public in the communities in which they operate. Television reception is difficult enough as it is in West Virginia because of the rough terrain, but the communities are small and separated by rough terrain, and probably never could support further stations. Sixty (or two-thirds) of these systems are in towns of less than 500 population and 72 or about 80% are in towns of less than 10,000 people. Sixty-five of the 92 systems have less than 1000 subscribers.[44] Obviously the impact of a blanket extension of copyright liability to these systems as well as larger ones could have a devastating effect upon television in West Virginia. Bearing in mind that approximately 60% of the systems reporting to the F.C.C. have less than one thousand subscribers, the destructive impact of imposing blanket copyright liability on the CATV industry would be felt nationwide.

It is no answer for the copyright proprietors to say they would be reasonable with these systems. The amount of the royalty to be charged is only part of the problem. As has been discussed above, these systems simply are not equipped financially or otherwise to negotiate clearances with 25 to 30 major copyright owners and the three networks for five or more program schedules being received in advance of broadcast and reception. Moreover, if CATV reception is infringing, many copyright owners may be unable to license substantial numbers of their programs to CATV (even if they were willing to do so at reasonable prices) because of having granted exclusive licenses for long

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[44] *Supra* note 2, Charts 1 and 3.

terms to nearby stations[45] and because of the probability that CATV rights may not have been cleared with many artists and performers by the owners of the television rights.

The right of the public to receive television broadcasts for enjoyment in their homes once the broadcast occurs is secured by the Communications Act[46] and it is the policy of that Act to secure the benefits of television for all of the people of the United States. This highly important public policy should be given great weight in determining whether the copyright monopoly should be applied in such a manner that service to thousands of viewers in hundreds of rural communities throughout the nation might be destroyed or at the least seriously disrupted.

CONCLUSION

Clearly, the language, legislative history, and underlying purpose of the Copyright Act do not compel the imposition of copyright liability on CATV system operators. The absence of compelling reasons, together with the demonstrable conflicts between imposition of copyright liability on CATV system operators and the fundamental policies of the Copyright Act, the Communications Act, and the antitrust statutes, in the light

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[45] Since television stations' audiences are much larger than the number of the CATV system's subscribers, the stations can afford to pay more than the CATV system for programs, and through exclusivity contracts could eliminate any CATV reception of programs which have to be licensed by the copyright owner to the station.

[46] 47 U.S.C. § 153(o).

of the disastrous effects upon the CATV industry and the public, require that the decisions below be reversed.

Respectfully submitted,

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January 24, 1968

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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

The All-Channel Television Society (ACTS) moves for leave to file a brief as *amicus curiae* in this case. The consent of the attorney for the respondent has been granted. The attorney for petitioner has stated he will not oppose this motion.

ACTS is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels and which do and will continue to depend for their economic survival upon revenues derived from the broadcast of copyrighted programs.[1] In order to obtain a maximum audience – and revenues – from the broadcast of these programs, the stations traditionally bargain for and obtain exclusive broadcast licenses in the areas the stations serve.

As ACTS will show in its brief, without licenses from the copyright holders, CATV systems operating in the service areas of UHF stations pick up and retransmit to their subscribers copyrighted programs broadcast by distant television stations serving other areas for which the UHF stations have also obtained broadcast rights. Such unauthorized CATV retransmission unfairly undermines and dissipates the broadcast rights for which the local UHF stations have bargained, since their main feature – exclusivity in the area served by the UHF stations – is destroyed.

To uphold the decision of the Court below, the Court must find that CATV retransmission of a program broadcast by a television station is a public performance of the program. Respondents, in their opposition to the Petition for Writ of Certiorari, and the United States, in its Memorandum, have conclusively established this proposition and ACTS will not burden the Court with an additional argument on the matter. However, ACTS can contribute to the Court's consideration of this case by focusing on the serious threat to the establishment and

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[1] ACTS was formed in April, 1967, but did not begin to function effectively until June, 1967. For this reason ACTS did not seek to submit an *amicus* brief in the Court below.

healthy maintenance of free, local UHF television service, and hence to the national communications system established pursuant to Congressional mandate,[2] that would be presented by the exemption from the provisions of the copyright act of CATV retransmission of programs broadcast by distant television stations.

For these reasons ACTS believes that its *amicus* brief will aid the Court in the disposition of this case and respectfully requests that leave to submit its brief be granted.

Respectfully submitted,

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Of Counsel

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[2] See Section 307 (a) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b).

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BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

ARGUMENT

One of the basic questions squarely presented in this case is whether CATV systems are liable under the copyright laws for the unlicensed retransmission of programs broadcast by television stations far removed from the community in which

the CATV system operates and clearly not intended for "off-the-air" reception by the systems' subscribers.

Whatever the role performed by CATV systems which merely improve reception of television programs intended to be received by the systems' subscribers, there is little question but that CATV systems, including the systems in this case, are today also actively engaged in and planning for the retransmission of distant television stations on a massive basis. Indeed, the records of the Federal Communications Commission reveal that some 230 petitions are pending for authorization to retransmit the programs of distant television stations. Moreover, in many instances, the CATV systems operate or plan to operate in areas where there are no unusual reception problems and where, as a matter of fact, a number of television stations provide free, off-the-air service not only to the specific geographic areas served by the CATV systems but to areas the CATV systems do not propose to serve for economic reasons or otherwise. Thus, CATV systems are planned for such major cities as Philadelphia, which has six commercial television stations in operation and one planned for the future,[1] Cleveland which has four television stations in operation, one under construction and applications pending for still another,[2] and Buffalo which has three television stations in operation and three planned for the future.[3]

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[1] See, *In the Matter of WIBF Broadcasting Co. and Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc., and Philadelphia Community Antenna Television Company*, FCC Docket No. , filed, January 10, 1968.

[2] See, *Telerama, Inc.*, 7 Pike & Fischer RR 2d 275 (1967).

[3] See, *Untravision Broadcasting Co.*, 11 Pike & Fischer RR 2d 1222 (1968).

CATV retransmission of distant stations is made possible through the use of sophisticated and expensive receiving antenna devices not available to the general public or through the use of microwave facilities which convert the television signals picked up to different frequencies and relay them to the CATV system's receiving station where they are reconverted for reception on normal television sets. See, *First CATV Report and Order*, 30 Fed. Reg. 6038 n. 1(b) (1965). CATV systems are capable of and now retransmit or propose to retransmit the programs of television stations operating hundreds – and in some cases more than a thousand – miles from the area in which the CATV system operates. See, *e.g.*, *Corsicana Television Cable Company, Inc.*, FCC File No. CATV 100-106. Moreover, CATV systems also originate their own programs. To cite but one instance, there are applications now pending before the Commission proposing a microwave network throughout the State of Texas for the sole purpose of providing to CATV systems programs not broadcast by television stations. See, *Applications of Dal-Worth Microwave, Inc.*, FCC File Nos. 7661/7662-C1-P-66. CATV systems also sell advertising, as shown by the "rate card" of the Reno, Nevada CATV systems appended hereto.

CATV systems, then, are nothing less than commercial "closed circuit" television stations, and there is no basis whatever for exempting them from the copyright laws. Indeed, such an exemption would not only undermine the statutory copyright scheme, but, as we shall demonstrate, would undermine the statutory communications scheme as well.

Pursuant to the Congressional mandate to achieve a "fair, efficient, and equitable distribution of radio services" throughout the United States (Communications Act of 1934, as amended, Section 307(b), 47 U.S.C. 307(b)), the Federal Communications Commission, in 1952, concluded that "as many

communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs" (*Sixth Television Report and Order,* 17 Fed. Reg. 3905, 3912-13 (1952)). The Commission recognized that the utilization of UHF as well as VHF channels would be necessary to achieve that end, since there are not enough VHF channels available to provide the desired multiplicity of television services throughout the country. However, until 1962 the Commission's goal was almost completely frustrated as a result of the scarcity of television receivers equipped to receive UHF channels. Since most television receivers were capable of receiving only VHF channels, few UHF stations were constructed and even fewer achieved a reasonable degree of economic viability. But the passage of the All-Channel Receiver Law in 1962 (76 Stat. 150, 47 U.S.C. Sections 303(a), 330) removed the artificial barrier to realization of the Commission's television allocation goal created by the manufacture and sale of "VHF only" television receivers. And consistent with Congressional and Commission expectations the pace of UHF development since the passage of the law has accelerated dramatically and an even more dramatic acceleration is insured for the future.

Thus, according to the records of the Federal Communications Commission, as of December 31, 1964, some six months after the All-Channel Receiver Law went into effect, there were only 88 commercial UHF stations on the air, while there are now 139 commercial UHF stations in operation, an increase of more than 50 percent.

Neither the development of additional UHF television services nor the prospect of the imposition of copyright liability has deterred the growth and expansion of CATV systems, as evidenced by the almost two thousand CATV systems now in operation and the plans for CATV systems in the nation's

largest cities which will serve hundreds of thousands of homes at development costs running into the tens of millions of dollars. See, *e.g., Ultravision Broadcasting Co.*, 11 Pike & Fischer RR 2d 1222; *Telerama, Inc.*, 7 Pike & Fischer RR 2d 275; *Midwest Television, Inc., v. Southwestern Cable Co.*, 6 Pike & Fischer RR 2d 785.

A substantial number of UHF stations which commenced operations after the passage of the All-Channel Receiver Law, and most UHF stations under construction and planned for the future, are and will be "independent," that is, not affiliated with one of the three national television networks. As such, they must rely heavily upon popular syndicated and feature film programs to attract the audiences and revenues necessary to sustain their operations, including their non-revenue producing public service programming. Without exception, every syndicated and feature film program broadcast by these stations is done so pursuant to a license granted by the holder of the copyright for that program which the UHF station has purchased at substantial cost. Thus, during 1967, WPHL-TV, an independent UHF station serving Philadelphia, Pennsylvania spent more than $800,000.00 for the rights to broadcast feature films and syndicated programs. See, *In the Matter of WIBF Broadcasting Co. and Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc. and Philadelphia Community Antenna Television Company*, FCC Docket No. , filed January 10, 1966.

Of primary importance to independent UHF stations purchasing licenses for syndicated and feature film programs is the right to exclusive showing of the programs in the stations' service areas for a reasonable period of time. Without exclusivity, the stations might not be able to attract the audiences necessary to derive sufficient advertising revenues to offset the costs of programs as well as the station's non-revenue producing programming.

However, CATV retransmission of syndicated and feature film programs broadcast by distant television stations can destroy the right to program exclusivity bargained for and purchased at substantial cost by the local stations. For example, CATV systems are planned for a number of areas in and around the City of Philadelphia which would retransmit the programs of three New York City independent VHF stations. UHF Station WPHL-TV, during the week of October 28 to November 3, 1967, surveyed programs broadcast by those New York City stations, as well as stations in operation in Philadelphia, and the survey established that during that week, 79.7% of all syndicated programs broadcast by the Philadelphia stations pursuant to exclusive licenses from the holders of the copyright for the programs were also broadcast by the New York City Stations.[4] Retransmission of the programs of the New York City independent stations by the Philadelphia CATV systems would therefore, at the very least, undermine the exclusivity right for which the Philadelphia stations have bargained and could even result in the ultimate demise of the Philadelphia independent UHF stations once the CATV systems were established throughout the entire Philadelphia area.

A further specific example of CATV destruction of program value and exclusivity rights is the experience of UHF Station WBRE-TV, serving Wilkes-Barre-Scranton, Pennsylvania. At a cost of $21,000.00, the station purchased a group of feature films, among which was the film "The Magnificent Seven." WBRE-TV scheduled the broadcast of the film for November 5, 1967, but on October 23, 1967, thirteen days

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[4] See, Petition of Philadelphia Television Broadcasting Co., *In the Matter of Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc.*

before its broadcast on WBRE-TV, "The Magnificent Seven" was broadcast by WOR-TV, one of the three New York City independent stations, and via CATV that broadcast was made available to more than 75,000 homes – more than 25 percent of the total – in the WBRE-TV primary service area. Significantly, without CATV the prior showing of the film in the Wilkes-Barre area (and the violation of WBRE-TV's right to exclusivity) would not have been possible since New York City is more than 100 miles from Wilkes-Barre-Scranton and beyond the normal service area of WOR-TV.

In sum, present-day CATV systems including the CATV systems in this case, are deeply engaged in the retransmission for a profit of the programs of distant television stations whose signals the CATV systems intercept and extend to the communities in which the CATV systems operate. CATV systems thus directly compete with local television stations for audience – and even advertising revenues – and if local television stations must obtain licenses for the copyright programs they transmit, then the CATV systems should also be required to obtain licenses for the programs of the distant television stations the CATV systems retransmit.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

CATV
6
RENO/SPARKS

ADVERTISING INFORMATION

RATE CARD NO. 1—Effective Jan. 1, 1968

785 E. 2nd
RENO, NEVADA 89502

AT LAST . . . television advertising rates at reasonable prices.

PLACE . . . your TV message on Independent CATV 6.

TIMES AVAILABLE . . .

Weekdays: 12:00 Noon — 1:30 p.m.
5:00 p.m. — 7:00 p.m.
4:00 a.m. — 8:30 a.m.

Weekends: 8:30 a.m. Saturday to 8:30 a.m. Monday

Slides with background music appear for one minute on a rotation basis.

Program a. — One slide* would appear 58 times per week.
Cost — 15 ¢ per min. — $8.70 per week

Program b. — Two slides* would appear 116 times per week.
Cost — 12½ ¢ per min. — $14.50 per week

* Slide must be provided by advertiser or will be supplied by us at our cost.

WHAT IS CATV 6 . . .

An independent closed circuit television channel available exclusively to Community/Antenna subscribers.

Programming consists of movies, sports, features, and cartoons.

(Sponsorship of programs is also available. Program sponsorship allows for 60 sec. pre-cut audio/tape message with slide. . . Racket Squad is an example of the many fine programs available . . . RATES ON REQUEST.)

COMMUNITY ANTENNA has over 10,000 sets connected providing an estimated 30,000 potential viewers for your message. This makes CATV 6 one of the most reasonable advertising methods available.

For more information, or to make arrangements for your commercial, call

COMMUNITY ANTENNA — 323-0741

and ask for the advertising manager.

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October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE AND BRIEF OF SCREEN COMPOSERS ASSOCIATION OF THE UNITED STATES OF AMERICA, *AMICUS CURIAE*

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INDEX

	PAGE
Motion for Permission to File a Brief Amicus Curiae	1
BRIEF AMICUS CURIAE OF THE SCREEN COMPOSERS' ASSOCIATION OF THE UNITED STATES OF AMERICA	3
Interest of Amicus Curiae	3
A Note as to CATV	4
I. Buck v. Jewell-La Salle Realty Co. Is Controlling on Petitioner's Public Performance Liability	4
II. No License Should Be Implied in Law in Favor of CATV	7
Conclusion	8

Table of Cases Cited

Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931)	4, 5, 6
Jerome H. Remick & Co. v. General Electric Co., 16 F. 2d 822 (S.D.N.Y. 1926)	5
Society of European State Authors & Composers, Inc. v. New York Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937)	5

Statute Cited

17 U.S.C.	6

Miscellaneous Cited

Hearings Before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives, 89th Cong., 1st Sess., ser. 8, pt. 3, at 1739 (1965)	6

IN THE

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UNITED ARTISTS TELEVISION, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42 (3) of the Rules of this Court, Screen Composers Association of the United States of America (SCA) respectfully moves the Court to grant SCA permission to file a Brief Amicus Curiae herein on the following grounds:

1. SCA has requested permission of both parties herein to file a Brief Amicus Curiae in support of Respondent. Respondent has consented thereto. On February 7, 1968, Petitioner Fortnightly Corporation declined to grant such permission, stating, however, that it would not oppose the instant motion.

2. SCA is a national association of professional composers only who create copyrighted music under special assignment for filmed and taped television programs and motion picture productions. Such music constitutes by far the greatest part of music

used in television and they derive through the performing rights organizations such as ASCAP and BMI, which administer the performing rights in such music, a major source of income therefrom and for many, the principal source of income. The determination in this case will therefore, vitally affect their economic situation as composers creating music for a livelihood.

3. The contending parties before the Court are substantial commercial interests and not individual creators. The latter also have a great economic stake in the Court's determination and seek to contribute briefly to the Court the particular viewpoint of the individual music creator on the basic question of whether a compensable public performance for profit is involved in CATV transmissions.

Respectfully submitted, this 9th day of February, 1968.

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IN THE

Supreme Court of the United States

October Term, 1967

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FORTNIGHTLY CORPORATION,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE SCREEN COMPOSERS ASSOCIATION OF THE UNITED STATES OF AMERICA

Interest of Amicus Curiae

The Screen Composers Association of the United States of America (SCA), organized about twenty-five (25) years ago is an unincorporated voluntary membership association of composers who create music under special assignment for filmed and taped television programs and motion picture productions. SCA functions for the purpose of improving the professional welfare of its members.

SCA comprises most of the leading composers of such music, approximately 150 members, who create for their livelihood most of the copyrighted music contained in television disseminations.

The performing rights held by them in such music are administered through performing rights organizations such as ASCAP and BMI. Their royalties or returns from such performing rights are a major source of income from such music, and for many the principal source of income. By far, the greater part of such income is from the television field where such music is mainly used. The determination in this case will therefore directly affect their economic situation as composers creating music for a livelihood.

A Note as to CATV

The nature, purpose, scope and functioning of CATV Systems are amply detailed in the briefs of the contending parties and in the opinions of the Courts below. As is apparent therefrom they are huge enterprises engaged in great markets and population centers and elsewhere throughout the country in purveying entertainment through wired transmissions on a vast commercial and technological scale. Utilizing most complex instrumentation they do indeed receive, convert, amplify and propagate the electronic embodiment of the original musical, or other, rendition. If ever thought to be, they certainly are not today the relatively simple cooperative self-help ventures of the private denizens of a community.

I

Buck v. *Jewell-La Salle Realty Co.* Is Controlling on Petitioner's Public Performance Liability.

Buck v. *Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931), is no hoary ancient precedent out of touch with the times. Contrariwise it is this Court's modern and carefully reasoned exposition of multiple performance liability in respect of simultaneous electronic transmissions, in full awareness and cognizance of the advancing communications technologies of the Twentieth Century which have opened

new avenues for the exploitation of copyrighted works. As therefore found by the courts below, petitioner's activities with respect to the transmitted performances ultimately perceived are inescapably within the orbit of performance liability of that case.

Even were *Buck* not controlling the Solicitor General would support such copyright liability unless a license is implied in law (pp. 2-3, *Memorandum for the United States as Amicus Curiae*).

Petitioner's effort to distinguish *Buck* (supra), *Society of European State Authors & Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) (hereinafter referred to as "SESAC"), and other transmission cases as involving reproductions or re-creations of the original rendition in perceptible form to the senses *within the defendant's own facilities* falls wide of the mark. The thrust of the cases is clearly otherwise and is not qualified by petitioner's strained and piecemeal shaping of the opinions. Nor may it be seriously argued today that the performance, perceptible to a public in the aggregate comprised of thousands of viewers in their individual private homes or quarters, is purely "private". See *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 822 (S.D.N.Y. 1926) and *SESAC* (supra).

Nor as Petitioner argues is any illegal double payment being sought here by the copyright owners. That others may pay the copyright owner with respect to their own performance, directed theoretically at least, to the same audience served in part simultaneously by CATV does not render the CATV payment for its performance a double one in fact, or illegal.

The scheme of copyright, we submit, is to afford the copyright owner, absent specific statutory restriction, a reward for the specified uses including public performance of his work, at least in all areas of profit making. This right of compensation should not be restricted or qualified

in the CATV medium because of the location or scope of operations of any CATV system whether in large cities or elsewhere. Undeniably the Petitioner would not engage in its activities without the aim of profit making. That the CATV profit making area may also contribute to the copyright owner's reward for the use of his property, can hardly mean that the copyright owner is being doubly or excessively compensated.

In the light of *Buck*, the disenfranchisement of copyright in the CATV area would be a most regressive interpretation of the Copyright Law (Title 17, U.S.C.), a statute conceived indeed to be a living branch of law adaptable to technological advances affecting the arts and not confined in its application to the particular media or processes of any given time. Since the composer members of SCA primarily rely on their performance revenue, it would be anomalous indeed, to find that the law permits those engaged in business for profit to have the right to use the creative product of these composers on a regular, continuing basis in connection with their business, without providing some compensation for the use of their property. It is only just that the law permits composers to reach new processes and businesses having a profit motive. As new communications technologies emerge, authors and composers may well suffer in that they may lose income from other older media, e.g. sheet music sales have enormously declined during the last several decades. *Hearings Before Subcommitte No. 3 of the Committee on the Judiciary of the House of Representatives,* 89th Cong., 1st Sess., ser. 8, pt. 3, at 1739 (1965).

Judge Woolsey aptly stated in the *SESAC* case:

> "This right, however, in these days when so many simultaneous public performances for profit are possible, can only be protected by continuous vigilance, and the owner of a copyright to a musical composition should have the chance to gather royalties whilst and where he may".

II

No License Should Be Implied in Law in Favor of CATV.

Petitioner argues for an exemption from copyright liability on the ground that communications policy and antitrust considerations require in effect, a gratuitous license to be implied in its favor as a matter of law. It conjures, otherwise, the dire situation of networks and copyright owners taking over or stangulating CATV for their own selfish purposes. It argues, moreover, that no sensible licensing procedures with copyright owners are possible, so that copyright owners must necessarily be disenfranchised for CATV operational purposes.

We fail to see any manifest congressional purpose implemented through the Federal Communications Commission or otherwise which requires an abnegation of performing rights in favor of CATV interests. It seems to us that the Copyright Act stands clearly for the reverse proposition. Judicial limitation of statutory performance rights cannot here be justified through dire prophecies of control and strangulation. It would be indeed strange to assume that the suppliers of copyrighted music for CATV transmission would not, in the regular course, or with the aid or direction of the courts if necessary, arrive at workable and satisfactory licensing arrangements with their new customer, CATV, as they have with older customers such as the broadcasters. Any anti-competitive results, should they develop, would require, as in the normal judicial course, the consideration of the courts on a case-by-case examination in other proceedings. This Court need only decide the instant case and should not be obliged in so doing to lay down what is in effect, anticipatory legislative guidelines on a subject which is presently receiving consideration in great depth from Congress.

Conclusion

We submit that in an age when modern media are, as a result of their scope and rapidity of dissemination, sapping and devouring more and more the creative genius which sustains them, the constitutionally sanctioned reward of the creators—copyright—should not be restricted for the benefit of a profit making industry such as CATV.

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FEB 12 1968 SUPREME COURT U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

vs.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Motion for Permission to File Brief Amici Curiae in Support of Respondent and Brief.

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SUBJECT INDEX

Page

Motion for Permission to File Brief Amici Curiae in Support of Respondent and Brief 1

Introduction 5

A. Interest of Talent Guilds 5

B. Television Payments to Talent Under the Collective Bargaining Contracts Between the Talent Guilds and the Motion Picture Producers and Television Networks and Stations 6

1. Collective Bargaining Contracts of Screen Actors Guild 6

2. Collective Bargaining Contracts of Writers Guild of America 9

3. Collective Bargaining Contracts of Directors Guild of America 10

4. Collective Bargaining Contracts of American Federation of Television and Radio Artists 10

C. Relationship of System of Talent Compensation in Television to the Protection of the Producer's Copyright 11

Argument 13

A. The Position of Petitioner Herein, if Sustained, Would Have the Immediate and Direct Effect of Depriving Talent of Compensation to Which It Is Entitled When Theatrical Motion Pictures Are Exhibited Over Television 13

Page

B. Petitioner's Position, if Sustained, Would Create a Deterrent to the Production of New Television Film Programs and Would Depress the Syndication Market From Which Rerun Fees to Talent Are Derived 14

C. To Hold That Petitioner Has a License Implied in Law to Broadcast Respondent's Copyrighted Motion Pictures Would Deprive Talent of the Fruits of Their Creative Efforts 17

Conclusion 18

INDEX TO APPENDIX

Page

A. The Following Are Pertinent Provisions of the Producers-Screen Actors Guild Memorandum Agreement of 1965 Covering Residuals Payable to Actors for the Television Exhibition of Theatrical Motion Pictures 1

B. The Following Are Pertinent Provisions of the 1967 Screen Actors Guild Television Agreement Covering Residuals Payable to Actors When Television Motion Pictures Are Rerun on Television 5

TABLE OF AUTHORITIES CITED

Miscellaneous — Page

United States Senate, Eighty-Ninth Congress, Second Session on S 1006 (1966), p. 207 9

United States Senate, Eighty-Ninth Congress, Second Session on S 1006 (1966), p. 228 10

Rules

United States Supreme Court Rules, Rule 35 1

United States Supreme Court Rules, Rule 42(3) 1

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UNITED ARTISTS TELEVISION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Motion for Permission to File Brief Amici Curiae in Support of Respondent and Brief.

Pursuant to Rules 35 and 42(3) of the Rules of this Court, the Writers Guild of America (WGA), the Screen Actors Guild (SAG), the Directors Guild of America (DGA), and the American Federation of Television and Radio Artists (AFTRA), (all sometimes referred to simply as "Guilds") respectfully move the Court to grant them permission to file a Brief Amici Curiae herein in support of Respondent on the following grounds:

1. The Guilds have requested permission of both parties herein to file a Brief Amici Curiae. On January 29, 1967, Petitioner Fortnightly Corporation re-

fused such permission, but stated through its attorneys that it would not file any formal opposition to a motion by the Guilds for permission to file a Brief Amici Curiae.

2. Each of the Guilds is the collective bargaining agent of employees who collectively constitute the artistic and creative personnel of the entertainment industry.

(a) WGA represents all writers employed by producers (including producers of motion pictures distributed by Respondent, United Artists Television, Inc.) for the purpose of preparing literary material for entertainment motion pictures produced primarily for exhibition over television, as well as all writers in the motion picture industry, and all writers of live TV programs.

(b) SAG represents all actors employed by producers referred to in (a) above and in the motion picture industry generally.

(c) DGA represents all directors employed by producers referred to in (a) above and in the motion picture industry generally.

(d) AFTRA represents all performers, including actors and announcers, who perform on live and recorded television programs and commercials as well as in radio, phonograph records and transcriptions.

3. Each of the Guilds has collective bargaining agreements with producers of films produced for or

exhibited over television. Said films, as in the instant case, are invariably protected by copyright. These collective bargaining agreements are to a large degree premised on the producer's ownership of the films and of the copyright and on the producer's control of the distribution and consequently of the exhibition of the films. Each of the agreements establishes minimum wage or salary scales for employment, and each provides for additional compensation in the form of residual payments to employees for exhibition of theatrical pictures on television and for repeat exhibition of television films (after the initial showing). The minimum residual payments required are, in the case of theatrical films, based on the proceeds derived by the producer (or distributor) of the films from the licensing of said films for exhibition over television. The patterns of employment and compensation of members of the Guilds will therefore be directly affected by the outcome of this matter, and consequently the Guilds are each vitally interested.

4. The question presented is whether CATV reproduction and broadcast constitute a copyright infringement of Respondent's copyrighted motion pictures. Respondent (or those in privy with it) are obligated to make residual payments to talent for television broadcasts of such motion pictures under circumstances elaborated on in our brief on the merits. CATV reproducers and broadcasters presently appropriate for their own profit the television broadcasts of such moton pictures,

which originate at stations which have paid for the license to broadcast the motion pictures. CATV broadcasters claim the right to so appropriate and broadcast the pictures without payment to Respondent, the distributor, the originating television broadcaster, or the creative talent.

5. The Guilds wish to make clear the far reach which the decision herein may have on employment and compensation patterns which have been created by a long history of collective bargaining.

Respectfully submitted this 9th day of February, 1968.

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INTRODUCTION.

A. Interest of Talent Guilds.

The Talent Guilds who have joined in this Brief represent the actors and other performers, writers and directors whose creative talents are utilized in the production of theatrical and television motion pictures and live and recorded television programs.[1] These artists have a vital concern in the outcome of this case. Their interest is a fundamental one, namely, that their livelihood would be affected and, in fact, seriously jeopardized if Petitioner's CATV system and other like systems were held to be entitled to freely pick up the television broadcasts of copyrighted motion pictures and television programs and transmit them to their paying subscribers without liability for copyright infringement.

This statement is neither exaggerated nor lightly made. Because the facts which support it may be overlooked in the clash of interests of the immediate parties to this proceeding, the Talent Guilds deem it appropriate, and indeed, essential to set them forth herein.

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[1]Screen Actors Guild (SAG) affiliated with AFL-CIO; membership over 18,000 members; represents performers employed in the production of theatrical and television motion pictures and television filmed commercials. Writers Guild of America (WGA) membership over 3,000 writers; represents writers who write for theatrical motion pictures, television motion pictures and live and recorded television programs. Directors Guild of America (DGA) membership over 3,300; represents directors, assistant directors, associate directors and stage managers who direct performers in theatrical motion pictures, television motion pictures and live and recorded television programs and commercials. American Federation of Television and Radio Artists (AFTRA) affiliated with AFL-CIO; membership over 16,000 members; represents performers in live and recorded television programs and commercials.

Central to an exposition of the economic detriment which would be sustained by members of the Talent Guilds from a recognition of Petitioner's position is an understanding of the structure and pattern of compensation to talent established under the collective bargaining contracts which exist between the Talent Guilds and the motion picture producers and television networks and stations. This pattern is historical, unique and indigenous to the nature of the Television Industry.

B. Television Payments to Talent Under the Collective Bargaining Contracts Between the Talent Guilds and the Motion Picture Producers and Television Networks and Stations.

Though they differ in detail, the respective collective bargaining agreements of the Talent Guilds follow the same general pattern with respect to payments to talent for television exhibition of theatrical and television pictures. Such payments are generally referred to in the industry as "residuals." As Screen Actors Guild is the largest of the Talent Guilds and has historically led the way for other Guilds in this area, its contracts will serve to illustrate the nature of residual payments.

1. Collective Bargaining Contracts of Screen Actors Guild.

The collective bargaining contracts of Screen Actors Guild provide a number of different formulas for the payment of residuals to actors.

For motion pictures produced in the period between August 1, 1960, and January 31, 1966, the collective bargaining contracts between Screen Actors Guild and the motion picture producers require the payment of 3.6% of the distributor's world-wide gross receipts de-

rived from the television exhibition of such motion pictures, for ratable distribution among the actors performing in such motion pictures.

For pictures produced subsequent to January 31, 1966, payments are made under a formula providing for the payment to each actor appearing in a motion picture, of a percentage of a specified base fee when such motion picture is first telecast and additional percentages when the distributor's gross receipts from such television exhibition reach certain stated amounts.[2]

For example, a free lance actor (actor engaged for a single picture) who works in a motion picture for a period of one week, is entitled to be paid 30% of a base fee of $300, or $90, when such motion picture is first exhibited on television. When the distributor's gross receipts from television reach the sum of $125,000, an additional 12½% of such base fee becomes payable. Similarly, when such gross receipts reach additional amounts, further percentages of such base fee become payable to the actor.

Actors who perform in motion pictures made primarily for television exhibition are likewise entitled to be paid additional compensation in the form of "rerun fees" each time such picture is retelecast in the same city for up to a total of ten such telecasts. Such fees are each percentages of the actor's original applicable minimum scale and aggregate an additional 225% of such initial minimum applicable scale.[3] Additional amounts equal to 6½% of the amount of such rerun fees are also payable to the Producer-Screen Actors

[2]See Appendix, Section A.
[3]See Appendix, Section B.

Guild Pension and Welfare Fund to provide pension and welfare benefits to actors.

In short, the compensation which actors receive from the television exhibition of the motion pictures in which they appear is directly geared either to the producer's gross receipts from such television exhibition or to the number of times the film is replayed on television. Many years of study and effort have been expended by the Screen Actors Guild in negotiations with motion picture producers to establish this system of compensation which has proven to be the fairest and most equitable means of compensating actors for the use and reuse of their performances in the television field.[4]

This is so because no one knows, at the time a theatrical motion picture is first shown on television or when a television program is first telecast, how many stations will purchase the right to exhibit the picture or program, or how successful it will be. It is therefore virtually impossible at the time of employment to fix a sum which adequately and fairly compensates actors for their services. If the amount fixed were low and the picture or program attained wide popularity, was repeatedly exhibited on television and returned a very substantial gross income to the producer, the amount might well be unfair to the actor. On the other hand, if the figure fixed were high, it would be unfair to the producer if the results of the telecasting were financially disappointing. In effect, residuals pro-

[4]The principle of additional payment to performers for reuse of their performances had its inception more than 25 years ago in the early collective bargaining contracts between the American Federation of Radio Artists and the radio networks and stations under which radio performers were paid additional compensation when recorded radio programs in which they performed were rebroadcast in the same area at a later time.

vide the means by which a performer shares in the success of a television program: the greater the use and exposure of the actor, the greater the compensation.[5]

Residuals are paid to all actors whose services are utilized in pictures that are shown on television, from stars and featured players down to the small part players and bit players who work at the minimum scale. This latter group comprise the bulk of the membership of the Guild. Such actors work very irregularly and depend on residuals for an important part of their income.[6] Since the inception of the residual structure in the collective bargaining contracts of Screen Actors Guild in 1952, more than 70 million dollars in residual payments have been paid to actors, plus substantial additional amounts paid to the actor's Pension and Welfare Plans.

2. Collective Bargaining Contracts of Writers Guild of America.

The collective bargaining contracts between Writers Guild of America and the film producers provide, as to theatrical motion pictures, for a payment to the writers of the story and screen play of 1.2% of the distributor's world-wide gross receipts from the television exhibition of such motion pictures, and in the case

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[5]The modern collective bargaining contracts between Screen Actors Guild and the film producers provide complicated and sophisticated arrangements for such payments. These include an obligation on the part of the producer to obtain "Assumption Agreements" from its distributor or those who purchase the film or the television rights therein by which such distributor or purchaser becomes directly liable to Screen Actors Guild to make such payments. See Appendix.

[6]Statement Charlton Heston. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, Second Session on S 1006 (1966) p. 207.

of television motion pictures, provide additional compensation for reruns under a formula similar to that in effect between the Screen Actors Guild and the film producers.[7] Like actors, writers depend on residuals to achieve a level of compensation which makes it possible for them to continue writing for motion pictures.[8]

3. Collective Bargaining Contracts of Directors Guild of America.

The collective bargaining contracts of Directors Guild of America provide, in the case of theatrical motion pictures, that 1.2% of the distributor's world-wide gross receipts derived from the television exhibition of such motion pictures, shall be paid into the Pension Fund of the Directors Guild. In the case of television motion pictures, they provide additional compensation for reruns under a formula similar to that of the Writers Guild.

4. Collective Bargaining Contracts of American Federation of Television and Radio Artists.

The American Federation of Television and Radio Artists has collective bargaining contracts with the television networks and independent television stations providing for additional payments to performers in live and recorded television programs when recordings

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[7]The Writers Guild of America 1966 Television Film Basic Agreement provides rerun fees to writers who receive story and teleplay screen credit for each rerun up to six, aggregating 165% of the writer's applicable minimum compensation for services in writing the story or teleplay.

[8]Statement Evelyn F. Burkey, Executive Director, Writers Guild of America East, Inc. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress Second Session on S 1006 (1966) p. 228.

of such programs are reused a second and subsequent times in the same broadcasting area.[9] Payments are also required for "syndication" on local non-interconnected stations, cable, recording or other means, for closed circuit television use and for pay television. Thus, the collective bargaining contracts of the American Federation of Television and Radio Artists, like those of the Guilds representing talent in the motion picture industry, affirm the rule that each broadcast is a performance for which the performer is entitled to payment.

C. Relationship of System of Talent Compensation in Television to the Protection of the Producer's Copyright.

The heart of the entire system of residuals provided under the various collective bargaining contracts between the Talent Guilds and the film producers is the protection which the film producers and their distributors have under the present copyright laws against the unauthorized performance of their copyrighted motion pictures on television. The copyright laws of the United States do not extend copyright protection to a performer in his performance or the interpretation of his role in a motion picture, or to the director for his creative talent in directing. Writers, when writing independently, have copyright protection. When working as employees, their work under the copyright laws normally would become the property of the producer

[9]Under the AFTRA 1966-69 National Code of Fair Practice for Network Television Broadcasting, such payments are each percentages of the performer's original minimum scale and aggregate for eight replays, 320% of the program fee paid to the performer for the original broadcast.

who hires them. Like actors and directors, their right to obtain additional compensation for television use of their work derives from collective bargaining contracts with their producer employers.

As a result, actors, writers and directors have been compelled to rely entirely on derivative rights established by collective bargaining contracts between their Guilds and their employers to obtain equitable compensation for the utilization of their creative efforts on television. These rights are in turn grounded on the producer's exclusive right to use the copyright. In brief, it is the license fees which motion picture producers and their distributors receive for the use of their copyrighted motion pictures, and which owners of live and recorded television program material receive for the use of such material, that generate the funds from which residuals are paid.

ARGUMENT.

A. The Position of Petitioner Herein, if Sustained, Would Have the Immediate and Direct Effect of Depriving Talent of Compensation to Which It Is Entitled When Theatrical Motion Pictures Are Exhibited Over Television.

The exhibition of theatrical motion pictures over television constitutes a large part of present-day television programming.[10] Under nation-wide collective bargaining contracts, actors and writers earn an important part of their compensation from such telecasting, while motion picture directors depend upon such compensation in part to fund their pension plan. If Petitioner and other CATV systems are allowed to pick up and transmit by wire or cable into the homes of their paying subscribers, copyrighted motion pictures broadcase by television networks or stations that have been licensed to make such broadcasts, without obligation to make any payment to the producer or distributor for such privilege, actors, writers and directors would suffer a serious and immediate financial detriment. In the first place, it would give to a new sector of the television broadcasting industry, of potentially enormous size and geographical coverage, the right to utilize the results of the performances of actors and of the talents of writers and directors without payment of any compensation therefor.[11] Such appropriation

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[10]A survey made by Screen Actors Guild showed that 704 domestic theatrical motion pictures were exhibited over television in a typical week (February 5-11, 1966) in five cities as follows: Los Angeles—226; New York—144; Boston—111; San Francisco—112; and Pittsburgh—111.

[11]It is obvious that the 1700 CATV systems that have literally mushroomed in recent years with knowledge that eventually they

(This footnote is continued on the next page)

of creative and artistic services is *per se* inequitable and should be opposed by public policy.

Moreover, television stations want fresh programs, not those that have already been shown in their area. Consequently the film producers and their distributors would not be able to sell programs to television stations in cities served by CATV systems, at an adequate price, or possibly not at all, if they have either already been shown in such cities or may be shown there later over a CATV system. In either case, the distributor's gross revenue would be reduced and the share thereof payable to Talent Guild members proportionately lessened. Thus, talent would suffer in two ways: (a) by being deprived of compensation from the CATV system when it picks up and broadcasts a motion picture to its subscribers without authority of the copyright owner; and (b) when the producer or distributor who has the distribution rights, tries to sell the picture in cities served by a CATV system and finds it must either sell at a lower price or lose the sale.

B. Petitioner's Position, if Sustained, Would Create a Deterrent to the Production of New Television Film Programs and Would Depress the Syndication Market From Which Rerun Fees to Talent Are Derived.

Most television film programs are initially exhibited over television networks for their first run. The producer usually loses money or, at the most, may break even from such network exhibition. It must look to the syndication market to make its profit, and the actors,

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may have to pay copyright fees, would multiply many times if they were assured that they could operate hereafter without liability for infringement.

writers and directors who render services in such programs likewise are dependent on the syndication market for rerun fees.

The revenue from this syndication market would be seriously reduced if CATV systems were permitted to bring copyrighted television film programs to their subscribers without payment to the copyright owner. Here one must consider not the present size of the CATV industry, but rather, its impact in the future when CATV systems have proliferated throughout numerous areas of the country.

At such time, if not subject to control and licensing by the copyright owner, CATV systems inevitably would be in a position to pick up television film programs from many large cities and penetrate numerous nearby cities ahead of the film syndicator. For example, they could import New York programs into Philadelphia; Baltimore programs into Washington, D.C.; Los Angeles programs into San Diego; Chicago programs into Detroit, etc. In each case, a part of the viewing audience would be lost to the local television station that later purchases the program from the licensed syndicator. This would create an insurmountable obstacle to the syndicator when it tries to sell the programs to local stations in such cities. The syndicator could not guarantee the local station that it will be the first station in the area to show such programs because they have already been seen locally by the subscribers to the CATV system. Even if not yet seen, the syndicator could not give such a promise, since there would be no assurance that the CATV system would not subsequently pick up the programs from a nearby city and broadcast them before the local station has been

able to schedule their broadcast. The syndicator would thus stand to either lose the sale entirely or be forced to make it at a reduced price in a fragmented viewing market.

As a result, the sale of television programs in syndication in numerous areas throughout the United States would be materially affected. The effect of such curtailment of the potential market might well be to make the continued production of many television programs unprofitable. This could have a serious effect on the employment opportunities of which are, at best, sporadic and scarce.

It would also in many cases deprive actors, writers and directors of rerun fees which now constitute a substantial part of their income. For example, assume that a television program has concluded its network run, goes into syndication and is first shown in Los Angeles or in New York. Under the collective bargaining pattern of all the Guilds, rerun fees become immediately payable to the talent, involved. These fees may involve a larger outlay for the produder than the total amount derived from its initial showing in a single major city. The producer or distributor expects, however, to make a profit by continuing the syndication in adjacent cities and numerous other cities throughout the United States from which it will ultimately realize sufficient revenue to reimburse it for such rerun fees and return a profit. If, however, CATV systems such as those of Petitioner have already brought the program to many such cities in advance of the licensed syndicator, the syndicator's potential market may be so emasculated as to make any syndication of the program impracticable.

Petitioner's position thus poses a serious threat to the employment and income of the major talent groups in the motion picture and television industries.

C. To Hold That Petitioner Has a License Implied in Law to Broadcast Respondent's Copyrighted Motion Pictures Would Deprive Talent of the Fruits of Their Creative Efforts.

Petitioner contends that if its operations are not, as a matter of law, outside the scope of the copyright law, it should be deemed to have an implied in law license under the copyright law to transmit television programs to its subscribers. This is, of course, but another way of saying that the copyright laws should not be applied to the activities of a CATV system. Labeling such claimed exemption an "implied in law license," adds nothing to support Petitioner's position.

As already pointed out herein, payment to talent for the television exhibition of theatrical and television motion pictures is based on the premise that the original employer owns or controls the copyright and is therefore able to derive income from its exploitation in which, under long-established patterns of collective bargaining, such talent shares. To hold that a CATV system has an implied in law license to broadcast programs to its subscribers without compensation to the copyright owner would completely nullify this concept. The members of the Talent Guilds could not, of course, share in the income derived by the motion picture producers from such broadcasts, since the producers and their distributors would derive none. Neither could they share in the income which the CATV systems receive, since such systems do not employ talent and have no collective bar-

gaining contracts with the Guilds. Thus, the foundation on which talent has been historically paid for their television services would be destroyed. Certainly, no compelling considerations of public policy require recognition of an implied in law license to achieve such result.

Conclusion.

It is respectfully submitted that the meritorious position of Respondent herein finds further support in the special considerations affecting the major talent groups set forth herein.

Respectfully submitted,

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Dated: February 9, 1968.

APPENDIX.

A. The Following Are Pertinent Provisions of the Producers-Screen Actors Guild Memorandum Agreement of 1965 Covering Residuals Payable to Actors for the Television Exhibition of Theatrical Motion Pictures.

1. *Television Exhibition of Theatrical Motion Pictures the Principal Photography of which Commenced after January 31, 1966*

(a) *Schedule of Payments:* With respect to each theatrical motion picture produced hereunder, the principal photography of which commences after January 31, 1966, which is released by Producer for exhibition on free television anywhere in the world, Producer agrees to pay to each actor whose services are included in such motion picture when telecast, compensation not less than the amounts provided herein. The term "actor" means those persons covered by the Basic Agreement and includes actors, singers, stuntmen and airplane pilots. Said compensation herein called "television fees" shall be computed on the following amounts (hereinafter referred to as base amounts) for the applicable length of engagement:

(1) Actors employed by the day:

Number of Days Worked or Guaranteed, whichever is Longer	Base Amount
One (1) day	$100
Two (2) days	$150
Three (3) days	$200
Four (4) days	$250

Five or more days shall be covered by the schedule below for all other actors.

All other Actors:

Number of Weeks Worked or Guaranteed, whichever is Longer	Base Amount
One (1) week*	$300
Two (2) weeks*	$400
Three (3) weeks or more	$500

*In applying the foregoing schedule an actor who works or is guaranteed a fractional week in excess of one week or two weeks shall be deemed to have worked a full additional week.

(2) Television fees shall be computed on the foregoing base amounts as follows:

(i) When such theatrical motion picture is initially exhibited on free television anywhere in the world, the following percentage of the applicable base amount shall be due: 30%

When Distributor's gross receipts (as defined in subsection (b) below) from the distribution on free television of such motion picture amount to $125,000, the following additional percentage of the base amount shall be due: 12-½%

When such gross receipts from the distribution on free television of such motion picture amount to $200,000, the following additional percentage of the base amount shall be due: 25%

When such gross receipts from the distribution on free television of such motion picture amount to $300,000, the following additional percentage of the base amount shall be due: 22-½%

When such gross receipts from the distribution on free television of such motion picture amount to $400,000, the following additional percentage of the base amount shall be due: 22-½%

When such gross receipts from the distribution on free television of such motion picture mount to $500,000, the following additional percentage of the base amount shall be due: 20%

After each additional full increment of $100,00 of such gross receipts in excess of $500,000 the following additional percentage of the base amount shall be due: 10%

(ii) Prime Time Network Exhibition: Not later than thirty (30) days after the first network exhibition on free television of any such motion picture in the United States, occurring in whole or in part during prime time, there shall be due and payable to actor (as a non-returnable advance against the payments due under the foregoing schedule) not less than 70% of the applicable base amount; provided that any amounts there-

tofore paid under this Section 1 shall be credited against such 70% payment.

Prime time shall mean 7:00 p.m. to 11:00 p.m.

As used herein, the term "network exhibition" shall mean the telecasting of such picture over the network facilities in the United States of NBC, CBS, or ABC, except (i) pictures telecast on a single regional network presently established and (ii) motion pictures telecast on any single regional network which may hereafter be established and which does not include New York, Chicago, or Los Angeles.

(b) *Definition of Distributor's Gross Receipts:* As used herein the term "Distributor's gross receipts" shall mean the absolute gross income received by all Distributors (as hereinafter defined) of such motion picture from the telecasting thereof on free television anywhere in the world and including, in the case of a "foreign territorial sale" by any such Distributor, the income received from such sale by such Distributor but not the income received by the "purchaser" or "licensee";

* * * * *

"Distributor" as used in this agreement shall mean the Producer when it distributes such motion picture through its own distribution facilities for telecasting on free television, and all other distributors engaged by Producer to distribute such motion picture for telecasting on free television.

* * * * *

2. *Responsibility for Payments* With respect to all motion pictures produced hereunder principal photography of which commenced on or after August 1, 1965, the following provisions shall be applicable:

(a) *Television Distributor's Assumption Agreement:* Prior to the commencement of principal photography of each such motion picture in which one or more actors covered by the Basic Agreement renders services, if the Producer is not also the Distributor on free television of such motion picture, Producer shall obtain from the Distributor having such free television distribution rights and deliver to Guild, a separate written agreement herein called "TELEVISION DISTRIBUTOR'S ASSUMPTION AGREEMENT," made expressly for the benefit of Guild as representative of the actors involved, by which such Distributor agrees to assume and pay the amounts payable hereunder by reason of the exhibition of such motion picture on free television, when and as the same become due.

* * * * *

B. The Following Are Pertinent Provisions of the 1967 SCREEN ACTORS GUILD TELEVISION AGREEMENT Covering Residuals Payable to Actors When Television Motion Pictures Are Rerun on Television.

15. Additional Compensation for Reruns and Foreign Telecasts.

(a) The salary paid to the player for his services in a television motion picture shall constitute payment in full for the telecasting of suchmotion picture once in each city in the United States and Canada in which any television broadcasting stations are

now located and once in each city in the United States and Canada in which any television broadcasting stations are hereafter for the first time established.

(b) Rerun Formula in the United States and Canada.

(1) A television motion picture which has been telecast not more than once in any city in the United States and Canada is in its first run. A television motion picture which has been telecast more than once, but not more than twice, in any city in the United States and Canada, is in its second run. A similar test applies in determining when a television motion picture is in its third and succeeding runs.

(2) If the Producer desires to acquire the right to telecast any television motion picture for more than one run in the United States and Canada, the employment contract of each player engaged therein shall contain a separate provision for additional compensation for reruns, which shall be not less than the following amounts:

For the second run, not less than 50% of the player's total applicable minimum salary if such second run includes the telecasting of such picture over a television network, otherwise such payment shall be not less than 40% of the player's total applicable minimum salary;

For the third run, not less than 40% of the player's total applicable minimum salary if such third run includes the telecasting of

such picture over a television network, otherwise such payment shall be not less than 30% of the player's total applicable minimum salary;

For the fourth run, not less than 25% of the player's total applicable minimum salary;

For the fifth run, not less than 25% of the player's total applicable minimum salary;

For the sixth run, not less than 25% of the player's total applicable minimum salary;

For the seventh run, not less than 15% of the player's total applicable minimum salary;

For the eighth run, not less than 15% of the player's total applicable minimum salary;

For the ninth run, not less than 15% of the player's total applicable minimum salary;

For the tenth and all additional runs, a single additional fee of 15% of the player's total applicable minimum salary.

The "total applicable minimum salary" is the total minimum salary for the type of contract under which the player was employed, for the period of the player's employment.

* * * *

(e) All payments of additional compensation for reruns, theatrical exhibition or foreign telecasts shall be made promptly by check, payable to the order of the player entitled thereto, and if not initially paid to the player, shall be delivered to Screen Actors Guild for forwarding to such player and compliance herewith shall constitute payment to the player. The Producer shall accompany such checks

with a statement of the title of the film and the use for which such payment is made. If Producer fails to pay such additional compensation when due and payable such delinquent payment shall bear interest at the rate of ten per cent (10%) per annum commencing to accrue from the date of such delinquency.

The Producer shall keep or have access to (i) complete records showing all cities in the United States and Canada in which all television motion pictures subject to this agreement have been telecast and the number of telecasts in each such city, the television stations on which telecast, and the dates thereof, and (ii) complete records showing Distributor's Foreign Gross for such pictures to the extent that such records are pertinent to the computation of payments for foreign telecasting.

Producer shall also keep or have access to such records as are necessary for the computation of additional compensation for re-runs and foreign telecasts for so long as such re-run or foreign telecast payments may be due or payable. Screen Actors Guild shall have the right, at all reasonable times, to inspect such records. The undersigned shall give Screen Actors Guild prompt written notice of the date on which each television motion picture covered hereby is first telecast in any city in the United States and Canada for the second run and for each subsequent run thereafter to and including the tenth run.

* * * * *

17. Responsibility for Residuals—Television Distributor's Liability and Producer's Liability.

(a) If a signatory Producer produces a television motion picture of which it is not the distributor and enters into a distribution agreement with a distributor who is not a signatory to the 1967 SCREEN ACTORS GUILD TELEVISION AGREEMENT, Producer shall forthwith upon entering into such distribution agreement, obtain from the distributor and deliver to the Guild a separate written agreement, herein called "Television Distributor's Assumption Agreement," made expressly for the benefit of the Guild as representative of the actors involved, by which such distributor agrees to assume and pay all fees and payments which become payable by reason of distribution under such distribution agreement as and when the same become due.

In the event of the expiration or termination of any such distribution agreement, the obligation of Producer to obtain and deliver to the Guild such Television Distributor's Assumption Agreement shall apply as well to any subsequent distribution agreement entered into by Producer with a nonsignatory, and Producer shall obtain and deliver an executed Television Distributor's Assumption Agreement within ten days after the execution of each such subsequent distribution agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY BROADCAST MUSIC, INC. FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

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INDEX

PAGE

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE vi

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I—CATV SYSTEMS GIVE PUBLIC PERFORMANCES FOR PROFIT WITHIN THE MEANING OF THE COPYRIGHT ACT 2

A. The Right Of Public Performance For Profit Has Consistently Been Held To Include The Dissemination Of Copyrighted Works By New Methods; CATV Does Not Differ In Principle From Other New Methods 2

B. Copyright Protects Each Public Performance Of The Content Of A Copyrighted Work Whether It Is Spoken On A Stage, Shown In A Theatre, Or Transmitted Or Retransmitted As Electromagnetic Energy 6

C. The Imposition Of Copyright Liability On CATV Operators Is Required By The Policy Of The Copyright Act 8

II—THERE IS NO BASIS FOR A "LICENSE IMPLIED IN LAW" PERMITTING CATV SYSTEMS TO PERFORM COPYRIGHTED WORKS, EITHER GENERALLY OR WITHIN A LIMITED AREA 11

A. A "License Implied In Law" Would Create An Unjustified Exemption From The Copyright Law By Judicial Legislation 11

B. There Is No Greater Justification For An Implied License In A Limited Area, Such As That Proposed By The Solicitor General, Than For An Unlimited License 13

CONCLUSION 22

CITATIONS

CASES:	PAGE
Associated Music Publishers, Inc. v. *Debs Memorial Radio Fund,* 46 F. Supp. 829 (S. D. N. Y. 1942), aff'd, 141 F. 2d 852 (2d Cir.), cert. denied, 323 U. S. 766 (1944)	7
Buck v. *Debaum,* 40 F. 2d 734 (S. D. Cal. 1929)	12
Buck v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191 (1931)	3, 12
Cable Vision, Inc. v. *KUTV, Inc.,* 335 F. 2d 348 (9th Cir. 1964), cert. denied, 379 U. S. 989 (1965)	9
Davis v. *Du Pont,* 240 F. Supp. 612 (S. D. N. Y. 1965)	3
Dorchester Music Corp. v. *National Broadcasting Co.,* 171 F. Supp. 580 (S. D. Cal. 1959)	3
Dugan v. *American Broadcasting Corp.,* 216 F. Supp. 763 (S. D. Calif. 1963)	6
Edwin H. Morris & Co., Inc. v. *Kaufman,* 59 U. S. P. Q. 393 (M. D. Pa. 1943)	8
F. C. C. v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940)	9
Harms v. *Cohen,* 279 Fed. 276 (E. D. Pa. 1922)	8
Harms, Inc. v. *Sansom House Enterprises, Inc.,* 162 F. Supp. 129 (E. D. Pa. 1958), aff'd sub nom., *Leo Feist Inc.* v. *Lew Tendler Tavern, Inc.,* 267 F. 2d 494 (3d Cir. 1959)	2, 3
Jerome H. Remick & Co. v. *American Automobile Accessories Co.,* 5 F. 2d 411 (6th Cir.), cert. denied, 269 U. S. 556 (1925)	3, 8
Kalem Co. v. *Harper Bros.,* 222 U. S. 55 (1911)	3
Law v. *National Broadcasting Co.,* 51 F. Supp. 798 (S. D. N. Y. 1943)	6

PAGE

M. Witmark & Sons v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923) 3, 12, 15

Mazer v. *Stein*, 347 U. S. 201 (1954) 6, 9

Metro-Goldwyn-Mayer Dist. Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932) 2

PIC Design Corp. v. *Sterling Precision Corp.*, 231 F. Supp. 106 (S. D. N. Y. 1964) 6

Prestige Floral, Societe Anonyme v. *Zunino-Altman, Inc.*, 203 F. Supp. 649 (S. D. N. Y.), aff'd, 301 F. 2d 286 (2d Cir. 1962) 6

Reed v. *Holliday*, 19 Fed. 325 (W. D. Pa. 1884) 12

Select Theatres Corp. v. *The Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943) 6

Shapiro, Bernstein Co. v. *Mitchell*, 41 U. S. P. Q. 645 (S. D. Miss. 1939) 8

Shapiro, Bernstein & Co v. *Veltin*, 47 F. Supp. 648 (W. D. La. 1942) 8

Society of European Stage Authors and Composers, Inc. v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937) 3, 12

The Gelles-Widmer Co. v. *Milton Bradley Co.*, 313 F. 2d 143 (7th Cir. 1963), cert. denied, 373 U. S. 913 (1963) 6

Tiffany Productions, Inc. v. *Dewing*, 50 F. 2d 911 (D. Md. 1931) 2

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) 9

PAGE

CONSTITUTION OF THE UNITED STATES:

Article I, Sec. 8, cl. 8 8

STATUTES:

Communications Act
47 U. S. C. § 414 9

Copyright Act

17 U. S. C. § 1(c) 2, 17
17 U. S. C. § 1(d) 2, 7
17 U. S. C. § 1(e) 2, 7, 12, 17
17 U. S. C. § 27 6
17 U. S. C. § 104 18

TREATIES:

Brussels Convention 1948, Stockholm Convention 1967, Article 11 bis (1) (ii) 21

ADMINISTRATIVE DECISIONS AND REPORTS:

CATV Operational and Ownership Data—1966, F. C. C. Release No. 605, Public Notice G, November 22, 1967 5

Columbia Broadcasting System, Inc., Pike & Fischer 10 R. R. 2d 809 19

Daytime Standard Broadcast Stations, Pike & Fischer 18 R. R. 1689 19

First Report and Order On Microwave Relays, 38 F. C. C. 683 5

Second Report and Order on CATV, 2 F. C. C. 2d 725 ..... 4, 5, 10, 17

LEGISLATIVE MATERIALS:

H. R. 2512 21

Hearings on H. R. 4347, Before Subcommittee of House Comm. on The Judiciary, 89th Cong. 1st sess., pt. 1 (1965) 17

PAGE

OTHERS:

Broadcasting 1968 Year Book 5

Broadcasting Magazine, January 29, 1968 20

Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the F. C. C. ... 15

State of the Union Message 19

Variety 1967 Annual Radio-TV Review 5

Wall Street Journal, October 18, 1967 16

IN THE

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OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42 (3) of the Rules of this Court, Broadcast Music, Inc. (BMI) respectfully moves the Court for permission to file the annexed brief *amicus curiae* herein on the following grounds:

1. BMI requested both parties herein to consent to its filing of a brief *amicus curiae* in support of respondent's position. On December 19, 1967, respondent United Artists Television, Inc., granted such consent. Petitioner Fortnightly Corporation, on January 23, 1968, declined to

consent, but its counsel authorized the undersigned as attorneys for BMI to state that petitioner does not intend to file any opposition to this motion.

2. On December 4, 1967, this Court granted petitioner's Petition For A Writ Of Certiorari. On that same date this Court granted permission to the National Cable Television Association, Inc. (NCTA) to submit a brief *amicus curiae* in support of the Petition and invited the Solicitor General to submit a brief expressing the views of the United States. NCTA stated in its motion that its brief represented the broad industry view held by the community antenna television (CATV) interests. The Solicitor General has filed a memorandum. NCTA has filed a motion for permission to file another brief, and we understand that other interested parties have made, or are about to make, motions for leave to file *amicus* briefs.

3. BMI is a music performing rights licensing organization. Fourteen thousand writers of music and 8,000 publishers of music have granted to BMI the right, under section 1(e) of the Copyright Act, to license the public performance for profit of their copyrighted musical works. Such performing rights are then licensed by BMI to a variety of music users, including radio stations and networks, television stations and networks, wired background music systems, hotels, restaurants and other establishments. During its last fiscal year, BMI collected in license fees approximately $25 million, the bulk thereof from broadcasters. All of BMI's income, after operating expenses and a reserve, is paid to its affiliated writers and publishers.

4. The question presented in this case is:

Do the activities of the operator of a CATV system in receiving and retransmitting copyrighted works transmitted by broadcasting infringe the right granted by the Copyright Act to the copyright proprietor to perform the copyrighted work publicly?

BMI is vitally interested in the resolution of this question, and it seeks to file a brief *amicus curiae* to support the decisions of the District Court and the Court of Appeals below.

5. CATV operators, including petitioner Fortnightly, have transmitted for profit and are transmitting for profit copyrighted music in BMI's repertory without license or payment of royalties. BMI, and its affiliated writers and publishers, will be directly affected by the outcome of this case. Petitioner seeks complete or partial exemption from copyright liability. The Solicitor General opposes any total exemption, but has apparently endorsed petitioner's request for partial exemption. It is the position of BMI that any judicially-created exemption—whether total or partial —would defeat the purposes of the Copyright Act and would be injurious to BMI and to the writers and publishers of music.

6. The respondent, United Artists Television, Inc., is an important distributor of motion picture films, some of which include music. However, the performing rights to the musical works in BMI's repertory which are embodied in such films are not vested in United Artists, but are licensed by BMI directly to broadcasters for performance solely over their facilities.

7. BMI believes that the parties to this action, not representing the writers and publishers of music, may present facts and arguments aimed at the effects of the decision below on their own economic interests. They can not represent the interests of the thousands of copyright holders engaged in the field of music whose legitimate interests would be greatly damaged if CATV operators were not required to pay for the use which they make of copyrighted works.

Respectfully submitted,

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February 10, 1968

BRIEF OF BROADCAST MUSIC, INC. AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

Broadcast Music, Inc. (BMI) is a music performing rights licensing organization which licenses the right publicly to perform for profit the music of more than 14,000 writers and more than 8,000 publishers of music. Those writers and publishers grant to BMI the right, secured to them by Section 1(e) of the Copyright Act, 17 U. S. C. § 1(e), to perform their copyrighted works publicly for profit. BMI licenses those performing rights non-exclusively to all types of music users, including radio and television stations and networks,[1] wired background music systems, hotels, restaurants and other establishments.[2]

The royalties collected by BMI, after deduction of expenses and reasonable reserves, are distributed to its affiliated writers and publishers. By far the largest part of those royalties are paid by broadcasters who have licenses to broadcast over their facilities any or all of the works in the BMI repertory at a royalty based on the station's gross receipts from advertising. Those licenses to broadcasters are limited to transmissions over their own facilities. They contain no grant of rights to operators of community antenna television (CATV) systems, who receive the broadcast signals and retransmit programs containing copyrighted material for their own profit. The issue in this case is whether CATV operators may exploit copyrighted works by communicating them to their subscribers without license from the copyright proprietors or the payment of any compensation to them.

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[1]Broadcasters obtain the right to perform the music which is in BMI's repertory solely under their licenses from BMI. Broadcasters do not obtain that right from the producers of motion pictures, recordings or tapes.

[2]Music users may obtain licenses directly from writers and publishers of the individual musical compositions in BMI's repertory, but, in practice, they do not do so.

That issue plainly has implications extending far beyond the operations of petitioner's systems in the two West Virginia towns here involved. CATV operators have become important disseminators of musical performances. There is every indication that their importance is increasing. Reversal of the decision below would create serious inroads upon the author's and composer's right of public performance for profit, the major source of compensation to the writers and publishers of music whose works are licensed by BMI.

ARGUMENT

I

CATV SYSTEMS GIVE PUBLIC PERFORMANCES FOR PROFIT WITHIN THE MEANING OF THE COPYRIGHT ACT

A. The Right Of Public Performance For Profit Has Consistently Been Held To Include The Dissemination Of Copyrighted Works By New Methods; CATV Does Not Differ In Principle From Other New Methods.

The rights under copyright include the exclusive right in the proprietor to perform the copyrighted work publicly[3] —publicly for profit if the work is a non-dramatic literary work, a motion picture other than a photoplay, or a musical composition.[4] The public performance right has consistently been held to embrace every means of communicating the contents of a copyrighted work to the public, whether by motion pictures,[5] wired transmissions,[6] broadcast by radio

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[3] 17 U. S. C. §§ 1(c),(d),(e).

[4] It is undisputed that if CATV systems engage in the public performance of copyrighted works, they do so for profit.

[5] *Tiffany Productions, Inc.* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931); *Metro-Goldwyn-Mayer Dist. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932).

[6] *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), *aff'd sub nom., Leo Feist Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

and television,[7] or the reception of a broadcast for communication to members of the public by wire.[8] It is immaterial that the particular device by which the public is enabled to receive the performance of a copyrighted work was not in existence when the statute was enacted.[9]

The courts below were plainly right in following this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 that "a single rendition of a copyrighted selection" may result in "more than one public performance for profit." 283 U. S. at 198. Indeed, the findings of the District Court, unchallenged here, show that the business in which petitioner is engaged, view from the technological and economic aspects, is much more clearly within the statutory purpose to protect the author's performance right than was the activity of the hotel in the *Jewell-LaSalle* case.

Technologically, in contrast to the simple installation in the hotel, the District Court described the operating requirements of petitioner's business as follows (Joint Appendix ("J. A.") 38a):

> "Each of the defendant's wire television systems requires a permanent staff of highly qualified technicians; intricate and expensive test and maintenance

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[7] *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Dorchester Music Corp.* v. *National Broadcasting Co.*, 171 F. Supp. 580 (S. D. Cal. 1959); *Davis* v. *Du Pont*, 240 F. Supp. 612 (S. D. N. Y. 1965).

[8] *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931); *Society of European Stage Authors and Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937).

[9] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, *supra*; *cf. Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911).

> equipment; special tools; continuous preventive maintenance; and an expensive inventory of cable, amplifiers and other spare parts. A system such as each of defendant's systems would require approximately ten to fifteen people to run it."

Economically, the distribution of programs is no sideline as it was to the hotel. That is the sole business in which CATV systems are engaged. As the District Court found, petitioner "promoted, vended and distributed programs to [its] subscribers" and "competed with the local television station and vied with programming much in the same way that television broadcasting stations compete with one another by means of the programs they offer" (J. A. 34a-35a).

It is indisputable that CATV systems have a great impact on the market for performances of copyrighted works. They have become important disseminators of copyrighted material, and derive large revenues from such use. The Federal Communications Commission (F. C. C.) has found that "CATV growth has been explosive and gives every indication of continuing its phenomenal spurt."[10] "Equally important," the Commission said, "is the changing nature of the CATV operation." The Commission noted that in 1959 the average CATV system provided three signals to its subscribers, that the average system "built today" [March 1966] has a 12-channel capacity, and that 20-channel systems are proposed, with industry leaders predicting that they will become commonplace in the next five years. It also noted that "the CATV industry has shifted its attention to the larger communities."[11]

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[10] *Second Report and Order, Community Antenna Television Systems* ("Second Report and Order"), 2 F. C. C. 2d 725, Pike and Fisher 6 R. R. 2d 1717, ¶ 116 (1966).

[11] *Id.* at ¶ 117.

There are presently over 2,000 systems.[12] According to data presented herein by the National Cable Television Association (NCTA), the CATV trade association, there are some two and one-half million CATV subscriber-homes.[13] Revenues derived from these homes amount to over $150,000,000,[14] exclusive of installation charges. The President of NCTA, in a signed article, has quoted with approval an estimate that by 1985 CATV systems will be taking in $2.3 billion a year.[15] If the decision below were reversed, the copyright proprietor could seek royalties only from those who derive part of the profits from the performance of his works—perhaps a comparatively small part.

The F. C. C. has found that CATV constitutes a threat to the broadcasters from whom BMI derives the major portion of its revenues.[16] To protect the broadcasters, the F. C. C. has adopted its rules regulating CATV. Whether those regulations will accomplish their purpose is not here relevant. The Court is here required to construe the copyright law. The regulations of an administrative agency acting under another statute form no part of the copyright law and do not aid in its interpretation. Those regulations, if not invalidated by this Court, could be modified at any time.

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[12]CATV Operational and Ownership Data—1966, F. C. C. Release No. 605, Public Notice G, November 22, 1967; *Motion and Brief of N C T A as Amicus Curiae, Jan. 24, 1968, p. 5.*

[13]The N C T A states that it represents 885 CATV systems having 1,407,000 subscriber-homes, which is over 56% of CATV served homes. *Brief of N C T A as Amicus Curiae*, p. 4.

[14]It is assumed that the average subscriber pays $5 a month, the figure assumed in the *Brief of N C T A as Amicus Curiae*, p. 18. Many systems charge more. *Broadcasting 1968 Year Book*, pp. 16, 18, citing a survey by Motorola, Inc., states that present industry revenues are $189,000,000—$171,000,000 from monthly charges and $18,000,000 from installation charges.

[15]Variety 1967 Annual Radio-TV Review, p. 34.

[16]*First Report and Order On Microwave Relays*, 38 F. C. C. 683, Pike and Fischer 4 R. R. 2d 1725, ¶¶ 49-82 (1965); *Second Report and Order*, ¶¶ 25-46.

B. Copyright Protects Each Public Performance Of The Content Of A Copyrighted Work Whether It Is Spoken On A Stage, Shown In A Theatre, Or Transmitted Or Retransmitted As Electromagnetic Energy

Petitioner contends (*Brief For The Petitioner,* p. 21) that, while the complex equipment which it operates receives signals, amplifies them, converts them to other channels, and distributes them by wire to thousands of homes, it does not engage in performance because it "deal[s] only with electromagnetic energy and in no respect with the sights or sounds of television programs." Petitioner ignores the fact that such electromagnetic energy, which it amplifies and exploits for its own profit, embodies the program content protected by the copyright law.[17] It seeks unsuccessfully to obscure the identity in all relevant respects between what the broadcaster does and what a CATV operator does. No meaningful distinction in terms of the Copyright Act can be made between the two.

Almost all television broadcasting, as petitioner recognizes (p. 22), is performed from film or tape, and most radio broadcasting is done from tape and phonograph records. When a network program is broadcast, there is a separate public performance by each station which receives it by wire or by microwave and transmits it to its local audience.[18] In all such cases, the broadcaster deals "only with electromagnetic energy" (p. 21), and the sights

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[17]Copyright protects the content of a work, rather than the tangible object in which it is embodied. 17 U. S. C. § 27; *Mazer* v. *Stein,* 347 U. S. 201, 217 (1954); The *Gelles-Widmer Co.* v. *Milton Bradley Co.,* 313 F. 2d 143, 147 (7th Cir. 1963), *cert. denied,* 373 U. S. 913 (1963); *Prestige Floral, Societe Anonyme* v. *Zunino-Altman, Inc.,* 203 F. Supp. 649, 651 (S. D. N. Y.), *aff'd,* 301 F. 2d 286 (2d Cir. 1962); *PIC Design Corp.* v. *Sterling Precision Corp.,* 231 F. Supp. 106, 111 (S. D. N. Y. 1964); *Dugan* v. *American Broadcasting Corp.,* 216 F. Supp. 763, 765 (S. D. Cal. 1963).

[18]*Select Theatres Corp.* v. *The Ronzoni Macaroni Co.,* 59 U. S. P. Q. 288 (S. D. N. Y. 1943); *Law* v. *National Broadcasting Co.,* 51 F. Supp. 798 (S. D. N. Y. 1943).

and sounds of its programs are not visible or audible within its station.

Petitioner acknowledges (p. 47) that the Copyright Act "expressly recognizes" that the playing of a record, film or tape in which the copyrighted work is recorded "constitutes a 'performance' of the work."[19] That recognition is required not only by Section 1(d) of the Act, cited by petitioner, but also by Section 1(e). The latter section, in granting a compulsory license for the mechanical recording of musical compositions, provides that the royalty paid for such a license "shall free the articles or devices . . . from further contribution to the copyright *except in case of public performance for profit*" (emphasis added).

Every performance consists only of the dissemination of energy. It is immaterial whether the energy consists of vibrations of the vocal chords, the plucking or bowing of a string, the activation of a column of air, the striking of a drum, the playback of a tape or recording, or the activation of a wire. The energy in each case serves to communicate the content of the author's work. Such energy becomes sight and sound only when it strikes the eye and eardrum of a sensate being and is perceived by the nerves and brain of a viewer or listener. Neither the broadcaster nor the CATV operator controls the loudspeaker or picture tube of the receiving set by which electromagnetic energy is converted into sound and light waves which are transmitted through the auditory and ocular system to the nerves and brain of the television viewer.

The relevance of the broadcasting cases may not be avoided by petitioner's reliance on the broadcaster's selection of the program material. First, the District Court expressly found that petitioner pre-selected the stations

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[19]See, *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund*, 46 F. Supp. 829, 831 (S. D. N. Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944).

whose programs were provided to the subscribers, and did so "in some instances, even contrary to the expressed preference of most of the subscribers" (J. A. 40a). Secondly, it has repeatedly been held that the exclusive right of performance may be infringed by the operators of establishments, such as ballrooms, even where a musician plays a composition without the operator's authority and contrary to his order.[20]

Petitioner's performance is undoubtedly "public". The claim that it is private because it takes place simultaneously in hundreds of homes rather than in a single public place was rejected at an early date.[21] Petitioner's contention is irreconcilable with both the broadcasting and the hotel cases.

C. The Imposition Of Copyright Liability On CATV Operators Is Required By The Policy Of The Copyright Act

There is no merit whatever in petitioner's claim that recognition of the CATV operator's role in performing copyrighted works would somehow offend the policy of the Copyright Act. The cases, cited pp. 2-3, *supra*, which recognize that the novelty of the mechanical device is irrelevant to the author's rights, reflect the consistent policy of construing the statutory language to fulfill the constitutional purpose to "promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[22] Petitioner seeks (pp. 58-62) to divide that policy into two, asserting—on the basis of

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[20] *Shapiro, Bernstein & Co.* v. *Veltin*, 47 F. Supp. 648 (W. D. La. 1942); *Shapiro, Bernstein Co.* v. *Mitchell*, 41 U. S. P. Q. 645 (S. D. Miss. 1939); *Edwin H. Morris & Co., Inc.* v. *Kaufman*, 59 U. S. P. Q. 393 (M. D. Pa. 1943); *Harms* v. *Cohen*, 279 Fed. 276 (E. D. Pa. 1922).

[21] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411, 412 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925).

[22] U. S. Const. Art. I, sec. 8, cl. 8.

statements taken out of context[23]—that the Act's "primary" consideration is to make works available to the public, with reward to the author a "secondary" consideration. The division is unreal; the two considerations are opposite sides of the same coin. Unless the author's participation in the fruits of his works is safeguarded as changes occur in economics and technology, the incentive to the creator to produce and disseminate will be seriously weakened.

The only issue here is one of interpretation of the Copyright Act. Petitioner seeks to confuse that issue, however, by invoking the supposed policy of the Communications Act. The effort is wholly misplaced since that Act does not repeal, amend, or act as an interpretive guide to any portion of the Copyright Act. Section 414 of the Communications Act, 47 U. S. C. § 414, explicitly provides that nothing in that Act "shall in any way abridge or alter the remedies now existing at common law or by statute . . ." See *F. C .C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). Neither expressly or impliedly does that Act limit rights under copyright. The Court of Appeals for the Ninth Circuit in *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348, 349 (9th Cir. 1964), *cert. denied*, 379 U. S. 989 (1965), in holding that any action to enforce rights in television programs against CATV retransmission must be based on copyright rather than state laws of unfair competition, stated:

> "Congress had not pre-empted the adjustment of property rights in the communications field by passage of the Communications Act of 1934."

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[23]The statement quoted from *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948) was in the context of a decision that the interest of rewarding the copyright proprietor is outweighed by the public interest making tying contracts illegal under the antitrust laws. The quotation of the *Paramount* sentence in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954) was immediately followed by an affirmation of the copyright purpose to encourage individual effort by personal gain as the best way to advance the public welfare.

The F. C. C. has repeatedly disclaimed jurisdiction over copyright issues.[24]

Petitioner also injects into the present question of statutory interpretation the extraneous assertion that recognition of the copyright proprietor's rights may have "harmful anticompetitive consequences." Copyright is by definition a limited monopoly. The possibility of abuse is inherent in every patent or copyright, and the antitrust laws are freely invoked where abuses appear. All copyright proprietors affected by the outcome of this case remain subject to the antitrust laws and, under those laws, may be enjoined from any improper extension of their statutory rights.

The only question here presented is whether CATV operators render public performances of the copyrighted program material which they transmit to their subscribers for profit. The courts below were plainly right in answering that question affirmatively.

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[24]With reference to the present case, the F. C. C. has stated (Second Report and Order, ¶ 108):

> "We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. *The station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so)* (emphasis added).

II

THERE IS NO BASIS FOR A "LICENSE IMPLIED IN LAW" PERMITTING CATV SYSTEMS TO PERFORM COPYRIGHTED WORKS, EITHER GENERALLY OR WITHIN A LIMITED AREA

A. A "License Implied In Law" Would Create An Unjustified Exemption From The Copyright Law By Judicial Legislation

Petitioner's claim to a "license implied in law" is simply a plea for the judicial creation of an exemption from the statute. Once it is recognized that CATV systems engage in publicly performing for profit the copyrighted works which they disseminate to their subscribers, the exemption which petitioner seeks can properly be granted only by legislation.

Not surprisingly, petitioner's arguments for an implied license are the same as those advanced to support the contention that the term "perform" in the Act should be narrowly construed to exclude the CATV operator. As shown above, those arguments are without merit.

The petitioner's stated concern for homeowners is unjustified. Homeowners do not infringe copyrights by receiving programs in the privacy of their homes. Full recognition of such private enjoyment does not require that control over the public performances of copyrighted works which are broadcast be taken away from copyright proprietors and handed gratuitously to third parties to be exploited for their profit.

The right of the public to receive broadcast performances privately does not warrant the creation of a wholly distinct license to give another public performance. The broadcast of a performance of copyrighted music from a concert hall is a separate public performance from that

which is rendered to the audience in the hall, and a separate payment is made for each. And if a theatre owner were to charge admission to view a television program, his separate public performance would not be authorized by the broadcaster's license.[25]

As the court below noted, the right of a copyright proprietor to limit licenses to perform his work in public to defined periods and areas or audiences has never been seriously challenged (J. A. 1362). This is in accordance with the basic policy of the Copyright Act that the author should have control over the exploitation of each of the rights conferred by his copyright, and thus be in a position to determine how those rights can most effectively be exploited.[26] Where there are exceptions to that policy, they have been created by statute. Thus Section 1(e) of the Copyright Act creates a compulsory license for the recording of a musical work after the copyright proprietor has authorized a single recording of that work. And the right of public performance for profit has been limited by the same section to exclude performances by juke boxes. The legislative character of these exceptions is apparent. It is inconceivable that either of them could have been engrafted on the statute by this Court. The proposal that this Court create a "license implied in law" is, equally, a legislative one. The creation of such a license for the entire United States would be destructive of the theory of copyright law and the

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[25] *Society of European Stage Authors and Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S. D. N. Y. 1937). The only holding to the contrary is *Buck* v. *Debaum*, 40 F. 2d 734 (S. D. Cal. 1929), which followed the District Court decision in *Jewell-LaSalle*, later reversed by this Court. *Debaum* is patently inconsistent with the decision in *Jewell-LaSalle* that there may be multiple performances and "a monopoly is expressly granted for all public performances for profit" (283 U. S. at 197).

[26] See, *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776, 780 (D. N. J. 1923); *Reed* v. *Holliday*, 19 Fed. 325, 327 (W. D. Pa. 1884).

interest of copyright proprietors. As the Solicitor General states (*Memorandum For The United States As Amicus Curiae,* p. 9), such an unlimited license "would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy."

B. There Is No Greater Justification For An Implied License In A Limited Area, Such As That Proposed By The Solicitor General, Than For An Unlimited License.

Petitioner erroneously states (p. 84) that "the court below placed an express limitation on its holding that petitioner's CATV systems are liable for copyright infringement." The sentence from the Court of Appeal's opinion which petitioner quotes, however, states only that if a system's subscribers, by normal antennas, could receive satisfactorily one or more of the stations whose programs are carried by the CATV system, "it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work" (J. A. 1366). Petitioner then proceeds (pp. 85-89) to knock down the straw man of its own creation, pointing out its indefiniteness and the impracticality of a license dependent on house-to-house investigation.

Petitioner contends, however, that, at the very least, the policies of the Copyright and Communications Acts require the implication of a license for a CATV system to operate within the Grade B contours of the television stations whose programs it seeks to appropriate. The proposal that this Court create such a partial exemption has been adopted by the Solicitor General, with the recognition (p. 6) that this "is not a license at all, but is simply a rule of law fashioned by the courts. . . ."

This Court is thus asked to refashion the Copyright Act to mean that the copyright proprietor's control over public

performances for profit does not extend to CATV performances of broadcast programs in an area where reception of the broadcast can be expected at the best 50% of locations for 90% of the time, but excluding areas within the "Grade A contour" of another station. The rationale of this proposal is that the "Grade B contour" is the "normal service area" of a station, and that increase of the station's audience in that area can be expected to increase its advertising revenues, and consequently its payment of performance royalties, without having "a substantial adverse impact on the incentive to create" (p. 11). That position, we respectfully submit, is fallacious.

1. Assuming *arguendo* the correctness of the Solicitor General's factual assumptions, acceptance of his proposal would deprive copyright proprietors of substantial revenues to which they are rightfully entitled under the basic premise of the copyright law. Copyright proprietors depend for their compensation upon royalties, and royalties are based on the proceeds which result from the utilization for profit of copyrighted works. The largest part of the enormous increase in revenue which CATV systems are expected to receive will come from the operation of systems wholly within the theoretical Grade B contours of originating stations in large cities, where the subscriber potential is highest. The earnings of CATV systems in such areas may, indeed, dwarf the receipts of local stations, and the application of such a standard as is suggested might deprive authors and composers of one of their most substantial sources of income.

Since a CATV system renders public performances, denial to the copyright proprietor of his right to participate in the revenue from those performances cannot be justified. CATV is big business. It can afford to pay the royalties

which are a normal part of any communications business using copyrighted material.[27]

The District Court was plainly right in excluding evidence intended to show that CATV performances should not pay their way because those performances increase the royalties from the separate performances rendered by the broadcasters. The assumption underlying the offer of proof on this point is that the copyright proprietor should not charge for one performance because that performance increases his revenue from another. This claim is indistinguishable from that advanced and rejected in the early radio cases that broadcast performances of a musical work should be free of royalty payment because those performances increase the sale of sheet music copies of the works. The factual premise of this argument was accepted by the court in *M. Witmark & Sons* v. *L. Bamberger & Co., supra,* but the argument was rejected on the ground that "the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections," and that in any event, "the method, we think, is a privilege of the owner." 291 Fed. at 780.

2. Accepting for purposes of argument the Solicitor General's assumption (pp. 9-10) that CATV carriage of a local station's signals may increase its advertising revenue and thus the revenue of copyright proprietors, the Solicitor General has failed to take into account certain countervailing considerations which would reduce copyright royalties.

There is nothing in the copyright law which prevents CATV systems from carrying advertising. Many of them

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[27]CATV systems enjoy a "ratio of profits to revenue . . . [of] 57 percent, or more than twice the 1963 profit margin of 27 percent . . . calculated for the TV broadcasting industry exclusive of the networks and their owned-and-operated stations." Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry," Report to the F. C. C., p. 27.

utilize some of their channels to present news, weather information, stock market reports, time checks and similar material, accompanied in some cases by advertising. Thus they compete with broadcasters for advertising revenue, and they use the copyrighted works which they present in order to attract subscribers who will view their material.

An increasing number of CATV systems, moreover, originate entertainment programming on some of their channels.[28] To the extent that viewers are drawn to CATV originated programs, even without advertising, such programs reduce the audience of the local broadcaster on which the broadcaster's advertising volume and rate depend and on which payment to the copyright proprietors depend. To the extent that they attract advertising, they directly reduce the revenue of the broadcaster from which royalties to the copyright proprietor are paid.[29]

Furthermore, there is nothing in the Copyright Act, whether construed as suggested or otherwise, that would prevent a CATV operator from eliminating the advertising which precedes and follows a copyrighted broadcast pro-

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[28]The Wall Street Journal of October 18, 1967 stated that 180 CATV systems are originating their own shows, that this is treble the number of systems which originated programs only a year ago, and that the NCTA estimates that within a year some 350 systems may be originating programs. The article refers to one CATV system which is receiving almost enough advertising revenue to cover the cost of originating its local shows.

[29]BMI certainly does not object to the origination of programs by CATV systems or to the carrying of advertising in connection with such programs, provided that CATV systems are not exempt from the payment of copyright royalties for the broadcast programs which they retransmit. Clearly, CATV operators, on any theory, would have to pay royalties for the use of copyrighted works in programs originated by them. If CATV is, in any respect, exempted from payment for the retransmission of broadcast programs, the CATV operator will have an incentive to rely on such programs and he will correspondingly be discouraged from originating independent programming.

gram, and if he wishes, to substitute other advertising messages. A regulation of the F. C. C. is intended to prevent this only with respect to the broadcasts of stations which the CATV system is required to carry under the Commission's carriage rules.[30] The rights under copyright should not be dependent upon the regulations of an administrative agency acting under another statute.

3. In certain other important respects the proposed curtailment of the right of public performance would undoubtedly cause injury to copyright proprietors and be detrimental to the public interest.

Musical compositions and non-dramatic literary works are entitled to protection against public performance only if they are public performances for profit. 17 U. S. C. §§ 1(c), (e). As is well known, non-profit broadcasting is increasing rapidly and will be further stimulated by the establishment of the Corporation for Public Broadcasting. Non-profit stations perform musical compositions and other non-dramatic works without the consent of, or the payment of any royalty to, copyright proprietors.[31] Adoption of the Solicitor General's theory would enable CATV operators to convert non-profit performances into profit performances for which the copyright proprietors would receive no compensation.

Even where copyright royalties are payable, there would be unjust consequences. Many FM radio and UHF television stations are in a position to pay only nominal fees. Performances of serious works, such as symphonies, could

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[30] *Second Report and Order*, ¶ 75.

[31] The spokesman for the American Composers Alliance testified before Congress that performances on such stations constitute a large percentage of all of the broadcast performances of the serious composer. *Hearings on H. R. 4347, Before Subcommittee of House Comm. on The Judiciary, 89th Cong., 1st sess., pt. 1, at 226 (1965).*

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v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

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not be authorized without exposing the works to further performance by a CATV system which might seriously jeopardize the prospect of other performances. In the case of a small station, the copyright proprietor would either have to impose a fee beyond the power of the station to pay, or to deny the use entirely. Such consequences would obviously be contrary to the public interest, as well as to that of the author.

4. The Solicitor General recognizes that the Grade B contour of a station is not only an approximation of its normal service area, but one which does not fit all situations and which the parties may seek to have changed by administrative action. He defends it, nevertheless, on the ground that its inexactness and instability "is probably outweighed by the certainty it provides as to much of the area covered" (p. 15).

That "certainty" is illusory even in the area of communications regulation for which the Grade B contour was devised. Thus, the Solicitor General concedes (p. 14) that the F. C. C. now permits parties to show that the actual contour of a station differs markedly from the predicted line. Accordingly the scope of the proposed "license" would apparently depend upon the outcome of an administrative proceeding to which the copyright proprietor would not be a party.[32]

As applied to copyright, the Grade B contour concept introduces alien elements of indefiniteness.[33] The Solicitor General admits (p. 15) that it would be necessary to leave

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[32]If it be assumed that the F. C. C. would allow intervention by copyright proprietors when the Grade B contours of a station are in issue, the burden and cost of participation in such a technical proceeding could probably not be justified.

[33]So indefinite a standard is inconsistent with the enforcement of the criminal remedies of the Copyright Act. 17 U. S. C. § 104.

"special situations" to what he terms "case-to-case resolution." In this area, the supposed "certainty" would be subject to variation in a judicial proceeding. The technological and theoretical considerations relating to Grade B contours do not produce "certainty", and they have no proper place in the administration of the copyright law.

Even in the present state of technology, it is not possible to impose rational geographical limitations. The Solicitor General recognizes (p. 14) that "the whole 'contour' concept may become obsolete if (through satellite and other improvements) a station's signals can be extended to encompass the entire continent." This is not a statement of future potential, but of present actuality. The synchronous satellites in space today are theoretically capable of reaching every home in the United States with copyrighted material originating in this or any other country.[34] CATV systems would be able to bring such satellite signals directly into the home, bypassing the local stations.

Many CATV systems, with their capacity for numerous channels, furnish radio as well as television programs. If the transmission of sight and sound is to be exempt within any area, sound alone would presumably be subject to the same limitation. However, there is no Grade B contour in radio. Clear channel radio stations serve much larger areas at night than they do in the daytime. At night, they furnish a recognized secondary service which extends for more than 700 miles.[35]

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[34] The President, in his recent State of the Union message, said that "we are going to bring to bear every resource of mind and technology" to bring education to children throughout the country by satellite broadcasting.

[35] *Columbia Broadcasting System, Inc.*, Pike & Fischer 10 R. R. 2d 809, 815. That secondary service primarily reaches rural areas. *Daytime Standard Broadcast Stations Pike & Fischer* 18 R. R. 1689, 1693, fn. 6. CATV transmission of distant radio stations to urban areas would divert listeners from local radio stations with resultant loss to copyright proprietors.

There have been indications, moreover, that both the President's Task Force on Telecommunications and the F. C. C.'s Advisory Committee on Land Mobile Services are considering removing the dissemination of television programs in whole or in part from the broadcast spectrum and causing them to be distributed by wire.[36] Faced with these developments, existing and future, it is apparent that the supposed "certainty" of the Grade B contour standard wholly fails to carry out the purpose of the proposed "license implied in law."

5. It is no answer to the foregoing considerations that, on the remand suggested by the Solicitor General, the District Court could fashion a license to meet particular cases of inequity, as well as the "special circumstances of overlapping . . . which argue against implying a license on the particular facts involved" to which his memorandum (p. 17) refers. Indeed, that very suggestion accentuates the fallacy in the proposal that, in a case involving solely the private rights of two parties under the existing copyright law, such a legislative function should be undertaken. Moreover, any such concept would make the copyright law practically unenforceable, requiring as it would, technological proof in addition to the normal proof of infringement.

The Solicitor General states (p. 17) that the problems involved are more appropriately dealt with by negotiation or legislative action. His suggestion is that this Court adopt a stopgap permitting extensive uses of copyrighted material which, under present law, are infringements. He states (p. 2) that the Court's decision "may contribute to the ultimate legislative solution" of the problems involved. He claims (p. 16) that his stopgap proposal coincides with

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[36]Broadcasting Magazine, January 29, 1968, p. 88.

"the most likely legislative resolution of the matter of CATV copyright liability for the future." It should be noted, however, that the proposed legislative resolution which he cites was embodied in H. R. 2512 when it was considered by the Subcommittee headed by Congressman Kastenmeier, but was rejected *in toto* when H. R. 2512 was passed by the House of Representatives. There has been no indication, moreover, that the Senate will restore the discarded CATV provisions of the bill, and it is certainly possible that other solutions will be sought.[37]

We respectfully suggest that the adoption of a Grade B contour concept by this Court would involve innumerable problems and complexities and would be far more likely to act as a Procrustean bed for future legislation than as an aid to such legislation. There are no sound reasons for the partial exemption suggested. The pendency of this case has not hindered the phenomenal growth of CATV systems. No industry has ever been hampered by the need to pay copyright fees. Indeed, the payment of copyright fees, by encouraging the dissemination of the material on which all communication depends, is an essential to every means of communication.

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[37]That free performance in an artificially limited area is not the logical legislative solution is suggested by the experience of other countries. The 58 countries of the Berne Union, whose adherents include most of the important countries of the world, are required by the specific provisions of the Berne Convention to protect the rights of the author in all areas of wire retransmission of broadcast performances. Brussels Convention 1948, Stockholm Convention (not yet ratified) 1967, Article 11 bis (1) (ii).

CONCLUSION

We respectfully urge upon the Court the affirmance of the decision below as a straight-forward, logical and, indeed, inevitable interpretation of the Copyright Act.

Respectfully submitted,

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INDEX

PAGE

Motion of American Society of Composers, Authors and Publishers for Leave to File Brief *Amicus Curiae* 1

BRIEF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AMICUS CURIAE 5

Description of ASCAP 7

ASCAP's Licenses—Its Members' Interest in This Controversy 8

Pertinent Provisions of the Copyright Law 9

Questions Involved 10

Summary of Argument 10

ARGUMENT:

I. Petitioner is Engaged in Presenting Public Performance Through Its Cable Television Service 12

II. In Interpreting the Performance Right Provisions of the Copyright Act, the Law Should Enable Authors and Users to Continue their Prac[illegible] of Determining the Amount to be P[illegible] by Relating it to the Receipts Derived from the Performance by the Particular User 15

III. Exemptions Are Dangerous. An Exemption Created to Favor a "Young" Industry Cannot Be Removed if it Becomes a Giant. CATV Is Likely to Become the Dominant Financial Force in the Communications Industry 17

PAGE

IV. There is Nothing in the Communications Act of 1934 to Support an Exemption of CATV 19

V. The Possibility that Some Copyright Owners May Misuse Their Copyrights is no Reason for Granting to CATV an "Implied License" to Perform all Copyrighted Works for their Profit 22

Conclusion 24

Exhibit A A1

Table of Cases Cited

Buck v. Jewell-La Salle, 283 U.S. 191 ..... 13, 19

Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 20

Harms, Inc. v. Sansom House Enterprises, Inc., 162 F.Supp. 129 (E.D. Pa.), aff'd per curiam sub nom. Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F2d 494 (C.A. 3) 13, 14, 18

Herbert v. Shanley Co., 242 U.S. 591 ..... 10, 16, 20

Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (C.A. 6) cert. den. 269 U.S. 556 ..... 13, 19

Jerome H. Remick & Co. v. General Electric Co., 16 F.2d 822 (S.D.N.Y.) 13

K-91, Inc. v. Gershwin Publishing Corporation, et al., 372 F.2d 1 (C.A. 9), cert. den. 36 U.S.L.W. 3280 (U.S. Jan. 15, 1968) 23

M. Witmark & Sons v. L. Bamberger & Co., 291 Fed. 776 (D.N.J. 1923) 18, 19

PAGE

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 20

Society of European Stage Authors and Composers v. New York Hotel Statler Co., 19 F.Supp. 1 (S.D.N.Y.) 13, 14

United States v. American Society of Composers, Authors and Publishers, 331 F.2d 117 (C.A. 2) ... 7n

Statutes Cited

Communications Act of 1934 ..... 11, 19, 20, 21

Copyright Act, U.S.C. Tit. 17:

Section 1(e) 7, 9, 11, 12, 18

Section 104 9

Other Authorities Cited

Hearings on S. 1006 (Copyright Law Revision—CATV) Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary 89th Cong. 2d Sess. (1966):

Pages 237-239 6

Pages 416-417 ..... 22n

Hearings on S. 2600 Before a Subcommittee of the Senate Committee on Patents, 68th Cong., 1st Sess. 3-4 (1924). 21

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909) ... 11n

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MOTION OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 35 and 42(3) of the Rules of this Court, the American Society of Composers, Authors and Publishers (ASCAP) respectfully moves this Court to grant ASCAP permission to file a brief *amicus curiae* on the following grounds:

1. ASCAP has requested permission of both parties herein to file *amicus curiae* in support of respondent. On February 7, 1968, petitioner Fortnightly Corporation refused such permission, but indicated that it did not intend to file a brief in opposition.

2. ASCAP is an unincorporated membership association authorized by its 8,469 composer and author-members and 2,788 publisher members to grant nonexclusive licenses for the performance of their copyrighted musical compositions in public for profit. The members reserve the right to license performances of their works independently of the Society. To the extent that their works are used on television and CATV, they will be directly and substantially affected by the final decision in this case. Thus ASCAP is particularly concerned about the outcome of this case.

3. Petitioner challenges the very foundation of copyright practices in the performance branch of the entertainment world, where each entrepreneur engaged in presenting performances of a copyrighted work pays the author or copyright owner a sum related to the participation of the particular entrepreneur in the total amount paid by the public for the performance. Having faced these problems for over half a century, ASCAP believes that it is in a unique position to present to the Court the views and experiences of its writer-and music publisher-members, many of whom depend for their livelihood on the income from the use of their works in public performances for profit.

4. Exercising rights in these performances safeguarded by the copyright laws, ASCAP's members make their works available to all users on a nonexclusive basis. They do not issue exclusive performance licenses to any broadcaster, network or other user.

5. Performance rights in musical works are limited by the Copyright Act to those performances which are both "public" and "for profit" (17 U.S.C. § 1(e)). This appeal

involves performance rights in dramatic works under 17 U.S.C. § 1(d). Unauthorized public performances of such works constitute infringing uses even though they are not "for profit". Copyrighted musical works are among the programs of all CATV systems including petitioner's, and the rights of composers and authors of these works will be affected by the decision in this case. The practices prevailing in licensing uses of these works should be considered. They are not likely to be brought to this Court's attention by the parties to this suit.

Respectfully submitted this 12th day of February, 1968.

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February 12, 1968

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

As the District Court pointed out, 255 F. Supp. 177, at 180, the petitioner's two cable television systems are "large-scale commercial enterprises advertising and promoting television programs, and making profit out of the exploitation of television programs . . ." and employ not mere simple "antennas" but elaborate, expensive rebroadcasting equipment.

Cable television had its beginnings in cooperative or municipal community antenna systems in areas with little or no access to television stations. But, as petitioner pointed out in its brief below, it is now "the fastest growing mass communication medium on the American scene". It is also one of the most lucrative, today collecting from its subscribers more than $150,000,000 annually. The value of

these systems is in excess of a billion dollars.[1] Often CATV operations are far more profitable than television stations, attracting such giants as the General Electric Company, Westinghouse and other large scale operators (see table attached to supplemental letter statement of Herman Finkelstein before the Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary on S. 1006, September 6, 1966, annexed hereto as Ex. A and printed in *Hearings on S. 1006 (Copyright Law Revision—CATV) Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 237-239 (1966)).

It is entirely possible that in the evolution of the television industry—with communications satellites replacing the present scheme of networks and affiliated stations—cable television will be the natural purveyor of most programs beamed by satellite. As the Solicitor General's Memorandum suggests, there may be a CATV network which will rival the present three television networks (Sol. Gen. Memo., p. 7, n. 4). A CATV network, capable of supplying several of the 20 channels in each CATV system is bound to be more powerful than the present TV networks which supply only a single channel in each market. Thus, in time, the largest commercial interest in television performances may be that of the cable television operators.

Some of the programs carried by CATV systems are broadcast initially by educational television stations. To the extent that CATV delivers to its subscribers the musical programs of those non-commercial stations, the CATV system is the only commercial enterprise associated with those performances. The stations do not pay for the performances, either because they have gratuitous licenses from the copyright owners, or because they assert that

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[1] A projection of the figures cited by the National Cable Television Association in its brief as *amicus* (p. 4), shows that there are 2,5512,500 CATV subscribers. When CATV systems are sold their value is usually computed at $400 per subscriber. Thus the systems, having 2,512,500 subscribers, are worth $1,005,000,000.

the performances are not "for profit" and therefore are exempt under Section 1(e) of the Copyright Act. These educational stations are increasing at a faster rate than commercial stations. It is profitable for CATV systems to furnish the programs of those educational stations to their subscribers.

Description of ASCAP

ASCAP is an unincorporated membership association organized under the laws of the State of New York with over 10,000 author, composer and publisher members who own copyrights in separate musical compositions. Each member grants to ASCAP, for a limited period, the non-exclusive right to license nondramatic public performances for profit of the member's copyrighted compositions. All members reserve the right to license their works individually. ASCAP may not license individual compositions unless both the members and the user request it to do so.

ASCAP licenses many thousands of users of music throughout the United States. Among the performances licensed by ASCAP (on either a paying or gratuitous basis) are those given by means of radio and television networks and stations (both commercial and educational), wire music systems, FM background music systems, and performances addressed to specific audiences at places such as hotels, nightclubs, restaurants, and supermarkets.[2]

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[2] In passing, it may be noted that in the developing stages of new media ASCAP has granted free licenses on request, or has refrained from pressing claims for infringement. Until 1949 ASCAP granted television stations royalty-free licenses "in an endeavor to assist the stations and promote the growth of the industry," as the court noted in *United States* v. *American Society of Composers, Authors and Publishers,* 331 F.2d 117, 121 n. 4 (C.A. 2). Indeed, ASCAP has stated publicly in discussions with representatives of NCTA (National Cable Television Association) that it will make no claim for past infringements and that any future agreement arising out of present discussions will be retroactive to the date those discussions commenced—approximately January 1, 1968.

ASCAP performs a virtually indispensable service both for its members and for the users of their music. By dealing with ASCAP, the user may avoid the necessity of dealing with a separate copyright proprietor for each composition performed. And by belonging to ASCAP, the individual member is spared what would be the impossible task of attempting to negotiate license agreements for each use by radio stations, television stations, restaurants, taverns and myriad other users all over the United States.

ASCAP's Licenses—Its Members' Interest in This Controversy

Inasmuch as the performances of ASCAP music by petitioner are those which are carried over television stations or networks before being picked up by petitioner and furnished to its subscribers—who cannot view and listen to these performances unless a fee is paid to petitioner—it is appropriate to examine the license agreement with ASCAP under which the television network or station makes its particular use.

The typical ASCAP license to a television station or network grants the right to the licensee to perform works in the Society's repertory over the particular network or station, and then contains the following express limitation:

> . . . nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

Pertinent Provisions of the Copyright Law

The rights licensed by ASCAP are those defined in Section 1(e) of the Copyright Law, U.S.C. Tit. 17, as follows:

> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

There are only two limitations on the right of "public performance for profit": one is contained in the last paragraph of Section 1(e). It provides that

> The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

The other limitation is contained in Section 104 of Title 17. It exempts certain nonprofit, charitable and educational performances. It provides:

> . . . That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Questions Involved

1. Does petitioner, in its operation of a commercial cable television system, participate in a "public performance" of copyrighted works within the meaning of the copyright law?

2. Did Congress by enacting the Federal Communications Act, overrule, *sub silentio*, express provisions of the Copyright Act in favor of owners of cable television systems?

3. Shall copyright owners be deprived of rights without compensation in favor of owners of CATV systems in spite of the express grant of such rights by the Copyright Act?

4. Should the Courts "imply" an exemption in favor of petitioner from its express statutory obligation to respect the performance rights of copyright owners?

Summary of Argument

Petitioner, representing an industry that is one of the most profitable and fastest growing commercial ventures in America, seeks an exemption from the application to it of the performing right provision of the Copyright Law. By resorting to a legal fiction—a license implied in law—these private enterprises, including some of the nation's largest commercial interests, would confiscate the rights of authors for their private profit without compensation. As this Court said in *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594, "there is no need to construe the statute so narrowly."

Petitioner and other CATV systems make greater profits from the programs furnished to their subscribers than do many broadcasters. They are more capable of

paying than authors are of sacrificing their royalties. A leading CATV operator has indicated that such royalties "would constitute a relatively small element in the total cost of providing a service desired by the public."[3]

The Copyright Law should not receive a narrow interpretation which would prevent authors from receiving compensation for their creative works in proportion to their value to each commercial user profiting from performances.

If an exemption were created to favor CATV, in response to its claim that it is a young industry, it will remain after CATV becomes a giant. CATV is likely to become the dominant financial force in the communications industry. There is a compelling analogy in the application of Section 1 (e) of the 1909 Copyright Act to the juke box industry—a relatively new and minor use in 1909, but which has become the largest commercial user of music, but pays nothing for the performance of copyrighted music.

The Communications Act of 1934 did not contemplate an exemption for radio, television or CATV although many have suggested it in the past for radio and other users.

If any copyright owners misuse their copyrights in dealing with CATV, they should be vigorously prosecuted; but the possibility of such abuse should not give rise to an exemption from payment to innocent authors under the guise of an "implied license."

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[3] Statement of J. Leonard Reinsch (See statements quoted in Ex. A annexed hereto).

ARGUMENT

I

Petitioner is Engaged in Presenting Public Performance Through Its Cable Television Service

In view of the exhaustive review of the law and facts relating to petitioner's responsibility for the performances involved in this case, this brief will not review that subject further.

It should be noted, however, that if petitioner is not responsible for the performances in this case, then CATV systems, however large and profitable, would not be required to pay for performances consisting of musical programs originated by educational television stations which pay no fees to copyright owners because (a) they assert that they do not perform "for profit" or (b) the copyright owners, including ASCAP, have given them gratuitous licenses on request.[4] In that event the composers and copyright owners would receive nothing for a performance of their works which is clearly both public and for profit.

Cable television is not unique in furnishing to the public performances which have been originated by someone else and thus deserves treatment no different from that given other media which operate in much the same way. For instance, the great bulk of radio programs consist of broadcasting performances recorded on phonograph records. And whether the recording was made with the express consent of the copyright proprietor or pursuant to the Copyright Act's compulsory licensing provisions (17 U.S.C. § 1(e)), it is clear that the broadcaster, using the necessary electrical impulses to present the recorded performance on the home receiving sets of the public at large, is itself engaged in presenting the performance.

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[4] To date ASCAP has granted gratuitous licenses for its entire repertory to 321 educational radio and television stations.

It is abundantly clear that a cable television operator who picks up and transmits a television broadcast is as much responsible for participating in the performance as a broadcaster who picks up and transmits any other performance. In the case of the broadcaster the performance is "public" because of the steps he takes to activate the necessary electrical impulses which are designed to carry the performance to members of the public who have the equipment necessary to translate the impulses back into the sound of the original performance. The broadcaster and the viewer have no direct contact with each other. In the case of the cable television operators, there is the additional element of an actual agreement between the system and the intended audience—each subscriber's home set is connected to the system when, and only when, that agreement is entered into. Once the home set is connected to a CATV cable, it can thereafter receive and reproduce only those programs which are supplied by the CATV operator.

It has been held time and again that all who are engaged in the presentation of a performance are responsible for that performance even though, as in the case of a radio broadcast, the decision to "tune in" on the particular program supplied by a radio station is made by individuals in their respective homes without any direct relationship with each other or with the broadcaster. *Jerome H. Remick & Co.* v. *American Auto. Accessories Co.*, 5 F.2d 411 (C.A. 6) *cert. denied* 269 U.S. 556; *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F.2d 822 (S.D.N.Y.). See also as to hotels, *Buck* v. *Jewell-LaSalle*, 283 U.S. 191; *Society of European Stage Authors and Composers* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y.); and as to wired music systems, see *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa.), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (C.A. 3).

The fact that cable television does not produce its own programs is immaterial. Radio stations playing records or tapes do not produce their own musical programs; nor do network affiliates when they broadcast network programs. Yet no one disputes the fact that they are responsible for their participation in the performance carried over their stations. A restaurant performing a recorded composition emanating from a remote turntable and delivered by a wired music service is engaged in giving a performance—as is the wired music supplier. *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa.), *aff'd sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 495 (C.A. 3). If petitioner's contention were upheld, a supplier of wired music would be liable to the copyright owner if he bought a phonograph record and transmitted the vibrations reproduced by application of a needle to the record spinning on his turntable. Yet he would not be liable if he obtained the same vibrations by tapping the channel of a "good music" FM radio station having little or no advertising and paying little or nothing for the right to perform copyrighted music. To the subscribers of a commercial "music service" the music sounds the same whether the turntable on which the record is placed is located at the premises of the music service or at the FM station. There is no reason why the author should be paid by the commercial user in one case and not in the other.

II

In Interpreting the Performance Right Provisions of the Copyright Act, the Law Should Enable Authors and Users to Continue their Practice of Determining the Amount to be Paid by Relating it to the Receipts Derived from the Performance by the Particular User.

The economics of the performance branch of the entertainment industry are ordinarily geared to apportionment of royalties on the basis of the receipts of a particular user. Thus the royalties paid to the author of a play are a percentage of the box office receipts; the royalties paid by a commercial broadcaster are related to its receipts from advertisers; the royalties paid by symphony orchestras are related to their budgets or potential box office and so forth.

This long-standing practice is rooted in both logic and fairness. It means that the royalty paid by each user is commensurate with the "value received" from the performance by that user, a value judged by an essentially objective standard—the amount paid by the public to the particular user offering the performance to the public. Thus petitioner's argument about "double payments" is entirely misplaced. It assumes, contrary to the reality of the situation, that the only "payment" for the use of a copyrighted work is the first one. It would be more accurate to state that that is just one aspect of the total payment made by the public. "Payment" then is the total amount the public pays, in manifold and various ways, for the benefits derived from use of the copyright proprietor's work. Some examples should make this quite clear.

A symphony orchestra pays a relatively small fee for its use of musical compositions. This small fee recognizes the fact that the great majority of symphony orchestras are not money-making institutions. But what if a major radio or television network picks up the performance (a

not uncommon occurrence) and obtains commercial sponsorship for the broadcast (or obtains spot announcements to be broadcast at appropriate times during the program)? Should not the composer be permitted to require payment from this commercial user? The station's receipts are far greater than the orchestra's. If the composer were left to just what he could get from the orchestra he would hardly find composing an engaging way of earning a livelihood. And society would be the loser, the purpose of the Copyright Clause of the Constitution frustrated. In many cases, the orchestra's performance is picked up by an educational television station. That station pays nothing to the composer, reflecting its views of the monetary value of the performance to the station. Then the broadcast is picked up by a privately owned commercial cable television system, and delivered to its audience in disregard of any obligation to pay for the entertainment material which makes the cable system's business possible and profitable, the composer would have very little to show for his efforts, the public will have been culturally enriched by his contribution, and the cable television owner will enjoy a monetary enrichment, however unjust.

If the public makes its payment only to the commercial CATV system, and the latter pays nothing to the author, the author will get nothing for his labors. As long as the public is paying to hear or see a performance, the author is entitled to his fair share of all the payments made by the public for the performance. That was the test employed by this Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591.[5]

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[5] The foregoing examples indicate the serious drawbacks to the proposals that there be an exemption for the cable systems, even for programs which they retransmit within the Grade B contour of the television broadcasting station from which the program originates. It is clear that the impact on the copyright proprietor who grants non-exclusive licenses available to all users will be the same whether the retransmission is in the Grade B contour or beyond.

Even where the original transmission has resulted in some rewards to the composer, that should not give the cable system the right to a free ride. For instance, a television network may broadcast the musical program presented during half-time at a professional football game. The network will pay a royalty which reflects its receipts from network sponsors (the football organization itself pays only a nominal royalty for all of its uses of music in the stadium). The broadcast will be relayed to the network's local stations which also pay a royalty based on their receipts from local sponsors. The cable system may pick up the game from a distant local station—neither the network's advertisers nor that station's advertisers have paid for delivery of their messages to the cable's viewers and once again copyright proprietors will be denied appropriate reward.[6]

III

Exemptions Are Dangerous. An Exemption Created to Favor a "Young" Industry Cannot Be Removed if it Becomes a Giant. CATV Is Likely to Become the Dominant Financial Force in the Communications Industry.

Unless there is an express statutory exemption, as in the case of coin-operated machines (juke boxes), copyright owners are entitled to expect payment for performances of their musical works from which profits are derived. The juke boxes of 1909 were a novelty located in penny parlors where they were regarded as "an advertising medium".[7]

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[6] If only the "first" payment to the copyright proprietor is counted, then copyright owners will reap paltry rewards indeed for their efforts—just the nominal sums paid by the colleges, while the television stations continue to obtain huge sums from sponsors for carrying the games during which the music is played.

[7] H. R. Rep No. 2222, 60th Cong., 2d Sess. 9 (1909).

As such, the industry was exempt from application of the performance provision of the copyright law. The statute provides that its performance "shall not be deemed a public performance for profit . . ." (17 U.S.C. § 1(e)). Today the juke box industry collects more than $500,000,000 annually for the performance of musical works. It is the largest commercial user of music but it pays nothing to the copyright owners because of an exemption intended to apply to what was then considered a minor infant industry.

To the extent that payments for the performance come out of the public's pocket, there is no reason to deprive the copyright owner of his fair share of such payments.

Payments by subscribers to whom performances are furnished—as in the case of cable television—may largely replace payments by advertisers. The present method of financing commercial broadcasting may be only a temporary phase in the long history of mass communication.

Initially, a broadcasting station was an adjunct to another business which the station advertised, *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D.N.J.). Then payments were derived from the sponsorship of programs by individual advertisers; now network broadcasters sell announcements to national advertisers; their local affiliates sell announcements to local advertisers, and CATV operators sell a "subscription service" to individual recipients of the program.

The sources of payment for the performance may change and the forms of energy conversion for delivering it may change, but whether the business is that of a network, or an affiliated station or a cable television service, the object of the enterprise is identical—to profit from performances which are public because they are intended for reception by a substantial number of people.

IV

There is Nothing in the Communications Act of 1934 to Support an Exemption of CATV.

Petitioner argues that public policy as laid down in the Communications Act of 1934 demands that broadcast programs shall receive as wide a dissemination as possible, and that this policy would be thwarted if anyone carrying a broadcast program to the public is required to pay for the use of copyrighted works. This ignores the fact that the Act of 1934 is silent on the subject; that before 1934 the courts had already imposed copyright liability on one who profited from public dissemination of such a broadcast—specifically, on the broadcaster himself (*M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D.N.J.); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (C.A. 6), *cert. denied*, 269 U.S. 556) and on hotels picking up the performance (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191); and that the Act of 1934 did not in any way purport to legislate concerning the use of copyrighted works.

If Congress had intended that there should be no copyright liability for participation in such performances it would have expressly so provided in the 1934 enactment. Property rights of copyright owners long recognized by the courts should not be abrogated by inferences drawn from a statute intended to regulate the conduct of an industry which reproduces (rather than produces) copyrighted works. The Communications Act regulates the monopoly rights given to broadcasters in their respective communication channels. The freedom of the air waves insured by the Communications Act does not mean that those who control the channels of communication (broadcasters or CATV operators) shall enjoy freedom from payment for use of the works that make their enterprises profitable. The composer of a song has created an original

work. The Constitution empowers Congress to make this the subject of ownership in the form of exclusive rights under the copyright law. The broadcaster, by the Communications Act, is given an exclusive franchise to control certain channels of communication. Those channels should be kept as open as possible. It is clearly not necessary to expropriate rights of authors to carry out that policy.

It must be remembered that those who create and publish literary or musical properties have no rights in their works except those created by Congress. *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225; *Compco Corp.* v. *Day-Brite Lighting Inc.*, 376 U.S. 234. The Copyright Act expressly grants the exclusive right of performance. Cable television would not exist as a commercial enterprise if it did not furnish performances of copyrighted works to its subscribers. That is what the public pays for. The rights which Congress secures to authors under the copyright law must not be narrowly construed in any case such as the one now before the Court, where the public pays petitioner for the privilege of enjoying a performance of the copyrighted work. *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594.

The Constitution expressly empowers Congress "to secure to authors . . . exclusive rights in their writings. . . ." If an exemption is implied in favor of commercial cable television systems, the right of "public performance for Profit" is no longer exclusive. There is no reason for granting such an exemption to commercial interests under a statute enacted pursuant to the Commerce clause of the Constitution.

If the policy of the Communications Act of 1934 makes it mandatory for CATV stations to have access to all programs of stations in the Contour "B" area, that policy can be implemented by an FCC regulation barring television stations from broadcasting copyrighted works unless some arrangement is made authorizing CATV systems in

that area to include those works on the programs they furnish to subscribers. But there is no such provision in the Communications Act and there is no basis for reading into it a provision that nullifies a right expressly granted to authors under the Copyright Act.

Petitioner cites Senator Dill's statement in introducing the Radio Act of 1927 that "radio in the United States is free" (Pet. Br., p. 80) apparently to support the proposition that CATV should be freed from any obligation to compensate the authors of the copyrighted materials they furnish to their subscribers. It is true that Senator Dill felt that radio should not be required to pay royalties to authors. He introduced S. 2600 to that effect in the First Session of the 68th Congress in 1924. In supporting the bill he advanced the same type of argument against alleged "double payment" that petitioner has advanced here. He said (*Hearings on S. 2600 Before a Subcomm. of the Senate Comm. on Patents,* 68th Cong., 1st Sess., at 3-4 (1924)):

> I believe that when the man who has created music has received his copyright fee, which he is entitled to have, from those who purchase his music, and that copyright fee has been paid, that that ought to be enough, and especially it ought not to be applied to the development of this art by these radio broadcasting stations all over the country.

But Congress did not accept that proposal then; the courts have uniformly rejected it since then, and it is submitted that this Court should not accept it now.

V

The Possibility that Some Copyright Owners May Misuse Their Copyrights is no Reason for Granting to CATV an "Implied License" to Perform all Copyrighted Works for their Profit.

Music is available to all on a nonexclusive basis through licensing organizations that have answered the special needs of manifold users presenting multiple performances. The system has worked well in practice. This is not challenged by CATV operators. There is no reason for permitting CATV to expropriate those works without payment under guise of an "implied license."

The petitioner has raised certain antitrust fears—the possibility of misuse of copyrights by combinations of copyright owners and broadcasters bent on denying programs to wire television. The "misuse" aspects of this case, however, have been postponed for consideration at a later date (255 F. Supp. at 182). In its antitrust argument, petitioner refers to a statement of Mr. Edwin M. Zimmerman of the Department of Justice at a recent Congressional hearing (Pet. Br., pp. 62-64). It omits, however, a part of the transcript in which Mr. Zimmerman stated that his remarks were inapplicable to works licensed by ASCAP:[8]

> Mr. Brennan [Counsel for the Committee]: Just one or two questions, Mr. Chairman.
>
> Is not ASCAP at the present time regulated by a federal antitrust consent decree?
>
> Mr. Zimmerman: Yes, it is.
>
> Mr. Brennan: With respect to their rates?
>
> Mr. Zimmerman: Yes.

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[8] *Hearings on S. 1006 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., (Vol. 8 of Report of Proceedings), at 416-417 (1966).

Mr. Brennan: Do you believe there is any need for an exception with respect to copyright rates where these are already regulated by antitrust consent decree?

Mr. Zimmerman: I am sorry, I did not hear the question.

Mr. Brennan: Is there a need for exception from copyright liability with respect to copyright works which already are regulated by the antitrust consent decree?

Mr. Zimmerman: I do not know of any such need.

Mr. Brennan: That is all.

Indeed, a case recently before this Court on application for certiorari shows in detail the compliance of ASCAP with the antitrust laws of the United States. *K-91, Inc.* v. *Gershwin Publishing Corporation,* 372 F.2d 1 (C.A. 9), *cert. denied,* 36 U.S.L.W. 3280 (U.S. Jan. 15, 1968).

The Solicitor General's brief in the case at bar refers to possible control of television programming by three networks and seven major movie studios and the importance of avoiding "the imposition of the structure of these older industries on the young CATV industry which could occur were the networks and film studios to obtain control of CATV systems" (p. 7, n. 4).

The CATV industry is far more powerful and has a much more promising economic future than all the composers and authors of American musical works put together —including their publishers. Vigorous enforcement of the antitrust laws should be a sufficient deterrent to anti-competitive practices, without sacrificing the rights of individual composers and authors. The antitrust division has succeeded in preventing the members of ASCAP from misuse of their copyrights. It is not likely that the Department of Justice will hesitate to enforce the antitrust laws against any interests which may attempt to "impose their structure" on the CATV industry.

Conclusion

It is submitted that commercial cable television operators are engaged in performing works to the same extent as broadcasters or hotel owners picking up performances and delivering them to their public; that their involvement and commercial stake is far greater than that of many broadcasters, particularly those in the UHF and educational fields; that the policy of the copyright law requires that these commercial users fairly compensate copyright owners in accordance with the scope of their performance of the copyrighted works, and that each commercial presentor should pay his fair share of the amount paid by the public to him for the performance. Certainly no valid reason has been advanced to read into the Copyright Law an implied exemption in favor of commercial wire television.

Respectfully submitted,

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February 1968

Exhibit A*

[LETTERHEAD OF]

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 Madison Avenue
New York, N. Y. 10022

September 6, 1966

Hon. Quentin N. Burdick,
Acting Chairman
Committee on Patents, Trademarks
and Copyrights
United States Senate
Washington, D. C.

Re: S. 1006—Supplement to
Statement of August 25, 1966

Dear Mr. Chairman:

When I appeared before the Committee in rebuttal on August 25, I emphasized the financial power of the CATV operators for whom the Department of Justice was seeking an exemption from the requirements of the Federal Copyright Laws. Attached is a survey showing that only 25 group owners of CATV systems own in the aggregate over 650 CATV franchises and have applications pending for almost 400 more.

I also mentioned that J. Leonard Reinsch, President of the Cox Broadcasting Corporation, and Retiring Director of the National Community Antenna Association had referred to copyright fees as "a normal cost of doing busi-

* Printed in *Hearings on S. 1006 (Copyright Law Revision—CATV) Before the Subcomm. on Patents, Trademarks, and Copyrights of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess., at 237 (1966).

ness." His entire statement on this subject reads as follows (National Community Television Association Bulletin, July 18, 1966):

> "THE COPYRIGHT QUESTION:
>
> "A recent court ruling, currently subject to appeal, implies that CATV operators may be required to pay fees for the privilege of transmitting copyrighted material to cable television subscribers. It has been suggested that this would impose a critical financial burden on the operators. In our opinion, the alarm is not warranted. Copyright fees are a normal cost of doing business in many fields. As in radio and television today, they would constitute a relatively small element in the total cost of providing a service desired by the public."

In addition, I should like to call the Committee's attention to a similar statement in a current prospectus of the Teleprompter Company, indicating that they can pay such royalties without any materially adverse effect on the company, even though Teleprompter's "principal activity is the ownership and operation of community antenna television (CATV) systems in sixteen communities throughout the United States." Referring to the case of *United Artists Television, Inc.* v. *Fortnightly Corp.* (and a similar case pending against Teleprompter) the prospectus states:

> "Even if plaintiffs ultimately prevail in either or both actions, management of the Corporation believes that the effect on the Corporation will not be materially adverse."

In any event, as the Department of Justice concedes, where rates of copyright owners are already regulated under the antitrust laws, as in the case of ASCAP, there is no need of granting a copyright exemption to CATV.

Exhibit A

It is submitted that if any concession is to be made to CATV, it should be done under the *Commerce* clause of the Constitution, and not the *Copyright* clause. The Commerce clause enables the FCC, if deemed necessary, to require stations holding a television license, to obtain rights for CATV operators for their contour "A" area; it also enables the Department of Justice to insist on rate regulation in cases of collective licensing. These avenues are open if resort to them is needed.

No case has been made for an exemption of CATV—a commercial operation—under the copyright law. The lights of authors should not be made subservient to the claims of private commercial interests. This was done in 1909 with respect to coin-operated machines. The precedent should never have been established. It is unsound and is not likely to be continued. It certainly should not be extended.

I appreciate the permission extended by the Committee to appear in rebuttal, and this further opportunity to supplement my extemporaneous remarks.

Respectfully submitted,

Herman Finkelstein

HF:J
att.

25 GROUP OWNERS OF CATV SYSTEMS

NUMBER OF FRANCHISES, FRANCHISE APPLICATIONS PENDING AND OWNERSHIP OF TV AND RADIO STATIONS

	Number of Franchises		Number of Applications Pending		Ownership of TV and Radio Stations			
					TV		Radio	
					UHF	VHF	AM	FM
General Tire And Rubber Company*		72		6	WHCT	WOR	WOR	WOR
Vumore (Oklahoma City, Oklahoma) 100%	35)		2)			WNAC	WNAC	WRKO
H & B Communications (Beverly Hills, California) 30%	37)		4)			KHJ	KFRC	KFRC
						WHBQ	WHBQ	WGMS
							WGMS	CKLW
							CKLW	
Jerrold Corporation (Lehigh, Pennsylvania)		41		51				
Cox Cablevision Corporation (Dayton, Ohio)	15)	40	13)	30		WSB	WSB	WSB
Trans Video Corp. (17%) (El Cajon, California)	10)		1)			WSOC	WSOC	WSOC
Finer Living, Inc. (25%)	1)		5)			WHIO	WHIO	WIOD
Columbus Communication Corp. (Columbus, Ohio)	3)		1)			KTVU	WIOD	
Buckeye Cablevision (45%)	4)		2)			WIIC		
Cleveland Area TV (45%)	3)		2)					
Georgia Cablevision Corp. (80%)	4)		–)					
Capital Cablevision	–)		6)					
American Cable TV, Inc. (Phoenix, Arizona)	30)	37	9)	9				
Also interest in & operates Community TV Reception Co. (Sherman Oaks, California)	5) 0							
Also interest in: Savannah TV Cable Co.	1)		–)					
Cable-Vista, Inc.	1)		–)					
Telesystem Corp. (Glenside, Pennsylvania)	29)	36	21)	55				
Also interest in Pioneer Valley Cablevision (Keene, N. H.)	7)		34)					

* In addition to owning 16 radio and TV stations, General Tire and Rubber Company owns the Yankee Radio Network.

Exhibit A-4

Exhibit A

	Number of Franchises	*Number of Applications Pending*	*Ownership of TV and Radio Stations*			
			TV		*Radio*	
			UHF	*VHF*	*AM*	*FM*
Telesis Corporation (Chicago, Illinois)	13) 35	19) 55				
Minnesota All Channel Cablevision (80%)	8)	26)				
Russell, Kansas franchises (80%)	1)	–)				
Telesis Engineering (100%)	13)	9)				
Nebraska City Cable TV, Inc.	–)	1)				
Gregg Cablevision, Inc. (Nashville, Tennessee) (Lin Broadcasting Company)	30	8	WTVP		WMAK WAKY KEEL KAAY	
United Utilities (Kansas City, Missouri)	29	11				
Television Communications Corp. (New York, N. Y.)	26	–				
Community TV, Inc. (Bozeman, Montana)	26	1				
American Cablevision Co. (Beverly Hills, California)	25) 25	1) 2				
New England Video Co.	–)	1)				
Teleprompter Corporation (New York, N. Y.)	25	2				
Jefferson-Carolina Corporation (North Carolina)	25	42		WBTV WBTW WFMY	WBT WBIG	WBT
General Telephone & Electronics Corp. (New York, N. Y.)	24	13				
Triangle Publications, Inc. (Philadelphia, Pennsylvania)	23	12	WLYH KFRE	WFIL WFBG WNBF WNHC	WFIL WFBG WNBF WNHC KFRE	WFIL WFBG WNBF WNHC KFRE
Video Cable Systems, Inc. (Huntsville, Alabama)	21					

Exhibit A

	Number of Franchises	Number of Applications Pending	Ownership of TV and Radio Stations			
			TV		Radio	
			UHF	VHF	AM	FM
Meredith-Avco (New York, N. Y.)	15) 21	28				
Shared with Jerrold Corporation	3)			WHEN	KPHO	WWDC
Through Tennessee Cablevision	3)			WLW-T	WLW	WOAI
				WLW-C	WWDC	WOW
				WLW-I	WOAI	KCMO
				WOAI	WHEN	KOIT
				WOW	WOW	
				KPHO	KCMO	
				KCMO	KYA	
				WLW-D		
Central California Communications Corp. (Salinas, Calif.)	20) 21	4		KSBW	KSBW	KSBW
Shared franchise with Vumore	1)			KSBY	KNGS	KSBY
General Electric Cablevision Corporation (Schenectady, N. Y.)	21	27		WRGB	WGY	WGFM
				WSIX	WSIX	WSIX
Reeves Broadcasting Corporation (Charleston, S. C.)	21	6		WUSN	WKEE	WKEE
				WHTN	WITH	WITH
National Transvideo, Inc. (Dallas, Texas)	17	1				
Newchannels Corporation (Newhouse Broadcasting)	17	24	WSYE	WSYR	WSYR	WSYR
			WTPA	WTVI	WAPI	WAPI
				WAPI	KOIN	KOIN
				KOIN		WTPA
Tower Antenna, Inc. (Coshocton, Ohio)	14	7				
Skagit TV Cable Co., Inc. (Seattle, Washington)	12					
Long Island Cablevision Corp. (Riverhead, N. Y.)	12					
	671	394				

FEB 14 1968 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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INDEX

PAGE

Motion for Leave to File Brief as *Amicus Curiae* .. 1

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AMICUS CURIAE:

Interest of the Authors League of America, Inc. 3

POINT I—CATV's use of copyrighted motion pictures is copyright infringement 4

POINT II—A copyright owner should not be deprived of valuable rights in his work by an involuntary license, created by "implication" .. 6

CONCLUSION 11

CASES CITED

Herbert v. Shanley Co., 242 U.S. 591, 594 ..... 5, 7

Mazer v. Stein, 347 U.S. 201, 219 (1954) 4

AUTHORITIES CITED

Business Week, February 19, 1966, p. 104 8

The Wall Street Journal, Jan. 15, 1967 8

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, a national society of writers and dramatists, respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the annexed brief. Of particular concern to authors is the contention of the Solicitor General that an author should be deprived of valuable rights in his work by imposition of a "license," to be created by implication.

Counsel for the Authors League has been advised by Respondent's attorneys that they consent to the filing of the within brief *amicus curiae.* Counsel for Petitioner advised the League's attorney that while they do not consent to the filing of this brief, they do not intend to file objections to the League's motion for leave to file it.

Because the Authors League believes the fundamental questions under the United States Copyright Act, presented here, are of tremendous importance to American authors, it respectfully requests permission to file the within brief *amicus curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., *AMICUS CURIAE*

Interest of the Authors League of America, Inc.

The members of the Authors League of America are professional authors whose books and plays are frequently adapted into motion pictures (which are subsequently shown on television) or television programs. Their income depends on the proceeds received by motion picture and television producers of their work. Often, the author's compensation includes a share of these proceeds.

POINT I

CATV's use of copyrighted motion pictures is copyright infringement.

The opinions of the District Court and Court of Appeals and the Solicitor General's brief, make it clear that a CATV system's retransmission of a copyrighted work to its audience of subscribers—using a television broadcast as the source of its performance—is copyright infringement.

Sections 1(c) and 1(d) of the Copyright Act gives the copyright owner of a motion picture or a television program the exclusive right "to exhibit, perform, represent, produce or reproduce it in any manner or by any means whatsoever." CATV's use of copyrighted works obviously comes within the language of the section, whatever the reader's choice of the appropriate operative verbs. Indeed, more important than the semantic decision as to whether CATV's use is a performance, exhibition, or reproduction, is the fact that it employs the copyright owner's work without his permission, charging an audience for the privilege of seeing it. It reaps the very benefit which the Act was intended to secure to the author—the opportunity to derive personal gain from his work. Cf. *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

If a CATV system took copyrighted motion pictures off the air, carried them by cable into a theatre, showed them on a screen (simultaneously with the originating broadcast) and charged a monthly admission fee, entitling the subscriber to attend all performances (at that theatre, and others which carried the programs broadcast by other stations)—certainly the system would be guilty of copy-

right infringement. The present CATV operation is no different in its purposes or effect—it simply carries the motion pictures to its audience, instead of requiring them to come to the theatre. Its purpose is the same—to collect an admission charge. And, as Justice Holmes long ago noted, it makes no difference whether "money is taken in at the door" or earned—through use of the copyrighted work—by other means. *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594.

The fact that CATV's use of copyrighted works employs the performance embodied in the originating broadcast as the source of its performance does not excuse the infringement. An unauthorized radio broadcast of a musical composition is an infringement, even though the station performed the composition by playing a record—embodying the live performance of the orchestra—which had been manufactured and sold with the copyright owner's consent; or even though the station performed the composition by picking up, and rebroadcasting to its audience, a broadcast made by another station which had been licensed to perform the work. An unauthorized television broadcast of a motion picture would be infringement even though the station retransmitted it from a film (embodying the original live performance) licensed by the motion picture producer; or even though the television station performed the picture by picking up, and rebroadcasting to its audience, a broadcast made by another station which had been licensed to perform the work.

As the Courts below had no difficult in finding, CATV is in the business of selling entertainment to its audiences, just as are motion picture and television theatres; it is

not in the business of selling appliances to individual customers, which they then use individually to improve the reception of their own sets.

POINT II

A copyright owner should not be deprived of valuable rights in his work by an involuntary license, created by "implication."

The Solicitor General has urged the Court to find that CATV's retransmissions of copyrighted works in the normal service area of the originating station are authorized by a "license," to be created by "implication."

We respectfully submit that there is no legal basis for thus creating new and severe exceptions to statutory copyright; a function which could only be performed by Congress. Moreover, there is no logical or equitable justification for thus drastically diminishing the rights of copyright owners to enrich and serve the convenience of an industry which is rapidly expanding and growing wealthy by transmitting copyrighted works to paying audiences.

The Solicitor General contends that a license limited to retransmissions within the normal service area of the originating broadcaster is justified because the advertising which accompanies that broadcast is aimed at the "potential audience" in the area, and that any increase of this audience through CATV retransmission would increase advertising revenues and thus increase copyright fees.

But this is no justification for a "license" which would allow CATV to do, without permission, something which is

basically the right of the copyright owner and which the copyright owner would be denied the power to exercise by the very same "license"—to charge a fee for communicating his work to an audience. Actually CATV derives profits from exploiting a copyrighted work whether the work is embodied in a program originated by a local broadcaster, or one in a distant area. Its charges to its customers do not vary, depending on the "mix" of local and distant retransmission. In either case, its "performances are not eleemosynary." (*Herbert* v. *Shanley Co.*, 242 U.S. 591, 594).

In reality, the effect of the Solicitor General's theory—if not the real premise on which it is based—is that a copyright owner is not entitled to derive income from his work from more than one audience, or more than one source. Carried to its logical extreme, this premise would deny authors, publishers and producers income from many uses of their work—and allow others to reap the benefits, charging the public for viewing or reading the creator's work without compensating him or obtaining his permission. As has been noted in the opinions below, publishers of newspaper, magazines and books derive income from a given work (income which produces the author's compensation) both by selling copies of their publications and by selling advertising which appears in these copies. Certainly no one would argue that because the publisher of a magazine or a paperback book is paid for the advertisements it contains —indeed, may make much of his profit from that advertising—that others may therefore communicate the contents of that work to readers in the same area of distribution, by selling pirated copies.

Yet this is the very principle which underlies the Solicitor General's concept of an implied license. Most commercial

and public broadcasters do not charge the recipients of their programs. However, some do. For example, some forms of "pay television" which broadcast their programs charge their subscribers a fee. There are also non-commercial television and radio stations which receive voluntary payments from their audiences. Since these broadcasters have already been paid once by their audience, it would follow from the Solicitor General's theory that CATV systems would now be entitled to retransmit these programs within the local service area, and incorporate advertising sold by them to business concerns.

One of the basic weaknesses of the implied license theory is its reliance on the assumption that CATV is a limited facility which merely adds a marginal audience to that reached by off-the-air broadcasting. But the CATV industry is rapidly expanding. It is already a major medium of communication. "The industry's optimists are shooting for 45-million or so homes in the next decade" (BUSINESS WEEK, February 19, 1966, p. 104); "CATV may conceivably transform the television industry" (ibid., p. 101); "just as the nation was wired for telephone, it could be wired for television" (E. A. Laport, Director of Communications Engineering, Radio Corporation of America; quoted in THE WALL STREET JOURNAL Jan. 15, 1967. It is also likely that satellite transmitters linked with CATV systems will, in the next few years, expand the normal service area of some television stations to embrace regional areas, or the entire country. These technological developments indicate that questions involving licensing—whether it is warranted, and if so, in what form—are questions which the Congress should decide. If this Court decreed the existence of a "license" today, it might have to

decree amendments to it in a few years, to accommodate to new developments.

Moreover, if the receipt of advertising revenue by the originating television broadcaster justifies an implied license, then, by the same logic, the absence of this revenue would—in the interests of justice—require the implication of exceptions to the implied license:

(i) If a CATV system sold its own advertising for programs retransmitted in the local service area, its subscribers should be entitled to a rebate on the charges they paid on the theory that CATV having been paid once could not legally charge them a second fee for the same broadcast.

(ii) A CATV system should not be entitled to an implied license when it retransmitted the "sustaining" (advertisement-free) programs of a local television station; or when it retransmitted copyrighted programs broadcast by a local education or public television station which carried no advertising. Since the copyright owner has not been paid out of advertising, he would be entitled to a share of the income his work produced for the CATV system.

(iii) A CATV system should not be entitled to an implied license if it retransmitted programs broadcast by a local commercial station but eliminated the station's advertising —or some of it—and filled the gaps with news announcements, weather forecasts, or background music. This would probably make CATV systems even more attractive to their audiences. The subscribers would then be paying a fee for entertainment unadulterated by irritating commercials; but the rationale that the program had been paid for by the advertising would be destroyed and so would the local station's advertising revenue.

It has been argued that the CATV industry must be permitted free use of copyrighted works to prevent prophesied violations of the antitrust laws by copyright owners. But if such dangers actually materialize, effective remedies for them are available under the antitrust laws. And if these remedies are insufficient, Congress can amend the antitrust laws and Federal Communications Act to provide additional remedies. Destroying the right of an author to share in the income his work produces for the CATV industry as an antitrust precaution is neither just nor necessary.

Paradoxically, the CATV industry and others, who urge the destruction of copyright to protect the public interest, do not appear the least concerned by lack of meaningful protection for other facets of the public interest which are affected by CATV.

In the last decade CATV has developed into a major industry and important medium of communication. Large corporations such as the General Electric Company and the International Telephone and Telegraph Company have acquired many CATV systems throughout the country. And the industry is making steady progress down the well-worn path to oligopoly without any significant legislative provisions for the regulation of charges to the public, or for preserving some channels on each system—free from control of private corporations—to serve cultural and educational uses. It is all too apparent that the CATV industry is developing, as did commercial television, for the sole purpose of returning the greatest profit possible to its owners, without any real concern for the public or the public interest.

Under these circumstances, expression of concern for the public interest is hardly an inspiring, equitable, or convincing reason for denying copyright protection to authors

and other creators of works used by CATV. Actually, the "concern" merely rationalizes a policy that would allow the CATV industry free use of property created by others, for its greater profit.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

IRWIN KARP
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LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

vs.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
BRIEF FOR THE NATIONAL ASSOCIATION OF BROADCASTERS, AMICUS CURIAE	3
Questions Presented	3
This Brief	4
Introduction and Summary of Argument	4
A. *The Broad Issue*	4
B. *Summary of Argument*	7
ARGUMENT	11
I The Industries Affected by This Case	11
A. *The Television Industry*	11
1. *Technology*	11
2. *The Broadcast Station*	13
3. *Service Areas*	14
4. *Programs and Exclusivity*	16
5. *Copyright*	19
6. *The Economic Structure of the Industry*	20
B. *The CATV Industry*	21
1. *Technology*	21
2. *Economic Structure*	23
3. *Types of CATV*	25
(a) *Local*	25
(b) *Metropolitan*	26
(c) *Unserved Areas*	27
(d) *Underserved Areas*	27
(e) *Imports from Distant Markets*	27
(f) *Numerical Distribution*	28
4. *The Consequences of CATV*	28
(a) *Copyright Owner*	28
(b) *The Broadcast Station*	30
(c) *Public Interest*	31
(d) *The Future*	32
C. *Moves Toward Solution*	33
1. *The Commission*	33
2. *The Congress*	33

		Page
II	Petitioner Has "Performed" or "Reproduced" the Copyrighted Work "in Public"	35
	A. *The Practical Facts*	35
	B. *The Law of Infringement*	38
III	Relevance of the Federal Communications Act and the Commission's Rules	39
	1. *There Is No Conflict*	39
	2. *Copyright Protection Remains Necessary*	40
IV	*Petitioner Has No License Implied in Law*	45
V	*Private Damages, Public Policy and Prematurity*	53

CITATIONS

Table of Cases:

Advisers, Inc. v. *Wiesen-Hart, Inc.*, 161 F. Supp. 831 (D. Ohio 1958)	57
American Visuals Corp. v. *Holland*, 261 F. 2d 652 (2d Cir. 1958)	57
Benny v. *Loew's, Inc.*, 239 F. 2d 532 (9th Cir. 1956), *aff'd by equally divided Court*, 356 U.S. 43 (1958)	45
Berks TV Cable Co., 9 Pike & Fisher RR 2d 664 (1967)	40
Buck v. *Jewell-LaSalle*, 283 U.S. 191 (1931)	11, 35
Burndy Engineering Co. v. *Sheldon Service Corp.*, 39 F. Supp. 274 (E.D.N.Y. 1941), *aff'd*, 127 F. 2d 661 (2d Cir. 1942)	57
Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F. 2d 359 (D.C. Cir. 1963)	30
Champion Plug Co. v. *Sanders*, 331 U.S. 125 (1947)	57
Channel 9 Syracuse, Inc. v. *FCC*, 385 F. 2d 965 (D.C. Cir. 1967)	42
Columbia Broadcasting System, Inc. v. *TelePrompter Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965)	54
Davilla v. *Brunswick-Balke Collender Co.*, 94 F. 2d 567 (2d Cir. 1935), *cert. den.*, 304 U.S. 572 (1938)	57
Douglas v. *Cunningham*, 294 U.S. 207 (1935)	56
F.C.C. v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955)	13

	Page
Green Mountain TV Cable Co., 9 Pike & Fischer RR 2d 231 (1967)	40
Inland Steel Co. v. *United States*, 306 U.S. 153 (1939)	59
Jewell-LaSalle Realty Co. v. *Buck*, 283 U.S. 202 (1931)	56
Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911)	11
Laramie Plains Antenna TV Association, FCC File No. BPTTV-2774-76, January 12, 1968	44
Leo Feist, Inc. v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959)	50
Locomotive Engineers v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960)	59
Midwest Television, Inc. v. *Southwestern Cable Co.*, No. 428, 1967 Term	8, 33, 39
F. A. Mills v. *Standard Music Roll Co.*, 223 Fed. 849 (D.N.J. 1915)	57
National Van Lines v. *Dean*, 237 F. 2d 688 (9th Cir. 1956)	57
Public Affairs Associates, Inc. v. *Rickover*, 284 F.2d 262 (D.C.Cir. 1960), *vacated on other grounds*, 369 U.S. 111	45
Robins Telecable Corp., 9 Pike & Fisher RR 2d 267 (1967)	40
Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009	45
Shapiro, Bernstein & Co. v. *Bleeker*, 224 F. Supp. 595 (D. Cal. 1963)	57
Shapiro, Bernstein & Co. v. *4636 S. Vermont Ave.*, 367 F.2d 239 (9th Cir. 1966)	57, 58
Sheldon v. *Metro-Goldwyn Corp.*, 309 U.S. 390 (1940)	58
Square D. Company v. *Sorenson*, 224 F.2d 61 (7th Cir. 1955)	57
Straus v. *Notaseme Co.*, 240 U.S. 179 (1916)	57
Taussig v. *Wellington Fund, Inc.*, 313 F.2d 472 (3d Cir. 1963), *cert denied*, 374 U.S. 806	57
Teamsters Union v. *Morton*, 377 U.S. 252	47
Toksvig v. *Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950)	45

Page

Turner & Dahnken v. *Crowley*, 252 F.2d 749 (9th Cir., 1918) 57
United States v. *Southwestern Cable Co.*, No. 363, 1967 Term 8, 33, 39, 48
Washington Pub. Co. v. *Pearson*, 140 F.2d 465 (D.C. Cir. 1942) 57
Westerman Co. v. *Dispatch Co.*, 249 U.S. 100 (1919) 56
Woodman v. *Lydiard-Peterson Co.*, 192 Fed. 67 (D. Minn. 1912) *aff'd*, 204 Fed. 921 (8th Cir. 1913) 57
Woolworth Co. v. *Contemporary Arts*, 334 U.S. 228 (1952) 10, 56
Yakus v. *United States*, 321 U.S. 414 (1944) 59

Agency Reports and Orders

FCC, *32nd Annual Report* (1966) 16
FCC, TV Broadcast Financial Data—1966, Pub. Notice 5317 (Aug. 25, 1967) 20, 21
FCC, Public Notice No. 12154 (Feb. 6, 1968) 28
First Report and Order, 38 F.C.C. 683 (1965) 31
Second Report and Order, Community Antenna Television Systems, 31 Fed. Reg. 4540 (1966) *Passim*
Reconsideration of Second Report and Order, 8 Pike & Fischer RR 2d 1677 (1967) 40
Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (Report to F.C.C.) (1965) ..... *Passim*

Statutes and Rules

Copyright Act:

17 U.S.C.
§ 1 35
§ 101 ..... 54, 55, 56
§ 115(b) 54
Rev. Stat. 4966, as amended, 29 Stat. 481 (1897) 55

Page

Communications Act of 1934:

47 U.S.C.

§ 151 13
§ 303 ..... 4, 13
§ 307 13
§ 325 ..... 16, 43, 51
§ 330 14

Rules of the Federal Communications Commission:

47 C.F.R.

§73.614 14
§73.606 13
§73.636 20
§73.684 ..... 15, 20
§73.689 14
§74.731 14
§74.732 14
§74.831 14
§74.832 14
§74.1103 ..... 41, 43
§74.1107 ..... 42, 43
§74.1109 42
17 Red Reg. 3905 ..... 14, 15

Congressional Material:

Hearings Before Subcommittee No. 3 of House Committee on Judiciary, 89th Cong., ser. 8, 1st Sess. (1965) ..... *Passim*
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Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. 90-1 (1967) 44, 45
H.R.Rep. No. 1559, 87th Cong., 2d Sess. (1962) 14
H.R.Rep. No. 2237, 89th Cong., 2d Sess. (1966) 24, 25, 34, 52
H.R.Rep. No. 83, 90th Cong., 1st Sess. (1967) 34
H.R. 11947, 88th Cong., 2d Sess. (1964) 33
H.R. 4347, 89th Cong., 1st Sess. (1965) 33

Page

H.R. 2512, 90th Cong., 1st Sess. (1967) 33, 44, 51, 52
S. Rep. No. 1526, 87th Cong. 2d Sess. (1962) 14
S. 3008, 88th Cong., 2d Sess. (1964) 33
S. 1006, 89th Cong., 2d Sess. (1966) 33
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113 Cong. Rec. H. 3643-44 (daily ed., April 6, 1967) ... 45
113 Cong. Rec. S. 14067 (daily ed. Oct. 3, 1967) 54
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Triangle Publications, Inc., *Broadcasters and CATV*, Jan., 1968 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

vs.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Broadcasters moves this Court under Rules 35 and 42(3) for leave to file a brief *amicus curiae* in this case. Its grounds are:

1. The National Association of Broadcasters ("NAB") is the trade association of the broadcasting industry. Its membership includes 522 television broadcast stations and the three national television networks, as well as over 3,000 radio broadcast stations and the four national radio networks.

2. The interests of the NAB are directed toward the impact of the community antenna television ("CATV") systems upon the television broadcast stations. In some instances, typically any CATV system which does no more

than afford better reception of the local broadcast station, the NAB sees no adverse impact upon the broadcast station itself, whatever may be the impact upon the copyright proprietor. In other instances, typically CATV importation of distant programs into the market area of the local broadcast station, the NAB fears that the survival of many local broadcast stations would be cast in jeopardy and potential UHF stations stifled if CATV systems were free to compete outside the copyright laws.

3. The interests of the NAB are thus allied with those of the respondent in respect of the issues now presented in this case. We suggest, however, that when this case returns for trial of damages and related issues, the trial court may find that any of a number of circumstances minimize any money judgment against petitioner, and that the Copyright Act can on a case by case basis produce a sensible and equitable integration of the CATV system into the broadcast industry. To that extent our position in the practical outcome of many cases might approach, by a markedly different legal theory, something close to the broad "middle-ground" result proposed by the Solicitor General.

4. Counsel for respondent and for petitioner have advised us that neither will oppose grant of this motion.

Respectfully submitted,

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BRIEF FOR THE NATIONAL ASSOCIATION OF BROADCASTERS, AMICUS CURIAE

QUESTIONS PRESENTED

Petitioner operates two community antenna television ("CATV") systems. Among the programs transmitted by these systems were motion pictures as to which respondent owns copyrights and as to which petitioner sought no license. The questions are:

1. Whether petitioner infringed respondent's exclusive right, under Section 1(c) and 1(d) of the Copyright Act, to "perform" or "reproduce" the motion pictures "in public."

2. Whether petitioner had a license implied in law, either

generally or within the normal service area of the originating broadcast station, to transmit to subscribers for charge copyrighted programs which were broadcast to the public without charge.

3. *Amicus curiae* suggests further that, in deciding these issues, which are alone presented at this interlocutory stage, the Court should recognize that a large variety of factual circumstances surrounding the issue of damages or accounting remain to be proved, and that many could affect the extent of any liability of petitioner to respondent.

This Brief

Our guiding purpose is to avoid duplication of matter presented by the parties. To that end, we adopt respondent's statement of facts and argument on the merits. Our own argument starts with a rather comprehensive description of the television broadcast and CATV industries and closes with an indication of the variety and importance of the issues which have not yet been tried and which we believe can alone define the exact impact of copyright liability on the CATV industry. The intermediate sections offer brief and supplemental comment on the issues which we expect to be more fully developed by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. *The Broad Issue*

From the beginning of television broadcasting, its regulation has been guided by the fundamental policy determination made by the Congress and by the Commission that the establishment of local broadcast stations should be encouraged. Only in this way could local public service programs and local self-expression be achieved. Because of this policy, hundreds of local stations have been established, many prosperous but many—particularly the UHF stations

—still either losing money or only marginally profitable.

The law of copyright is critically important to the development of local broadcast stations because copyrights are an important means employed to protect a station's exclusivity. "'Exclusivity'—a concept evidently viewed with alarm by petitioner but plainly with favor by both the Congress and the Commission—is central to the health of a broadcast station. Its revenues are obtained from advertisers and are large or small depending upon the size of its viewing audience. The station's appeal to viewers is that it will provide programs that they will like and that they cannot see on another channel. This promise of exclusivity cannot be made unless the seller of the program can, on his part, guarantee territorial exclusivity to the broadcast station.

Program distribution developed quite naturally in accord with the commercial reality that there are many separate television markets and that the value of a program to a broadcaster depends importantly upon the program supplier's promise not to license the program to other stations serving the same market. The program supplier relied in large measure upon the copyright law for the effectiveness of his guarantee of exclusivity. In some cases, as with respondent, the entire program was the subject of a copyright; in others, basic elements of the program were the subject of copyrights held by third persons and the program supplier acquired the necessary licenses to use the material.

Since broadcast stations were unquestionably subject to the strictures of the copyright law, these guarantees of exclusivity were effective. Accordingly, not only have the program suppliers, and through them the copyright holders, been able to protect their property interests, but also the public policy in favor of the establishment and growth of local broadcast stations has been promoted.

The rapid spread of CATV has introduced a wholly new

element into the picture. Whether considered from the perspective of the viewing public, the copyright owner, the program supplier, the broadcast station, or the electronic engineer, CATV is simply another means of distributing television programming, indistinguishable in any material fashion from television broadcast. Unless, therefore, CATV is subject to the same copyright rules as broadcast stations, the integrity of the pre-existing distribution system, with its emphasis upon "exclusivity" as the primary protection for the local station, will be seriously jeopardized by the consequent freedom of CATV systems to shuttle programs from one market to another for public distribution.

In the first years of CATV this threat did not assume dangerous proportions because CATV served largely as a supplement to the local broadcast station, extending its range to homes within its market area which for one reason or another were not receiving an adequate signal. More recently, however, CATV systems have come on a large scale to import into the market areas of local stations programs broadcast by far-distant stations serving a different market. Along with this development there has come the establishment of CATV systems in metropolitan markets. The profits to such CATV systems are substantial and, if the systems are in truth freed of the cost of the programs which they sell, could become startling. This effort of the CATV systems to break out of their local boundaries and to import programs from other markets without regard to the copyright laws must not only seriously damage copyright owners, but will also, by denying to local broadcast stations the exclusive program rights upon which they depend, seriously undermine the public policy in favor of local broadcast stations.

B. *Summary of Argument*

I

The largest part of our argument is devoted to a factual exposition of the television and CATV industries, which does not lend itself to useful summarization.

II

We adopt the relevant portions of respondent's brief and of the memorandum of the Solicitor General discussing the case law and showing that petitioner has "performed" or "reproduced" respondent's copyrighted works "in public."

So far as concerns the policy of the Copyright Act, petitioner's actions in selling and delivering to its subscribers copyrighted programs undermine precisely those interests the Act was designed to protect. Against the will of the copyright proprietor and the broadcast stations to whom exclusive licenses are given, CATV enterprises systematically appropriate copyrighted programs and sell them to their subscribers, many of whom would not otherwise have viewed the programs and who would accordingly have constituted an untouched market for the copyright proprietor. Unless this is prohibited under the Copyright Act, grave harm will be done to the actors, authors, composers, producers, and supporting personnel who depend for their livelihood upon copyright protection, as well as to the broadcast stations whose audiences and revenues are based upon their exclusive program rights. If broadcast stations themselves are not free to expropriate copyrighted material in this fashion, as surely they are not, then neither are CATV systems, which are in essence simply another mode of distribution of television programs.

III

The rules promulgated by the Federal Communications Commission which are under consideration in *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, do not conflict with the decision of the Court of Appeals in this case. The clearest evidence is that the Commission itself has said that there is no conflict and that the Solicitor General has not supported petitioner's position.

On the other hand, affirmance by this Court of the validity of the rules would not obviate the need for subjecting CATV systems to copyright liability. The Commission has said that the rules are not intended to protect the interests of copyright holders or their licensees, and in fact they do not afford such protection except incidentally. Thus, for example, the rules restrain importation by CATV of a distant signal only in certain portions of the largest 100 markets, and even that restraint can be and often has been removed by the Commission. Moreover, some 1500 CATV systems are "grandfathered" under the rules, so that as to those the only inhibition is that they may not duplicate a local station's program by importing a distant signal for showing on the same day. This, as the Commission itself has recognized, provides no significant protection respecting "syndicated" programming which is licensed to stations for broadcast whenever they choose and is rarely broadcast by different stations on the same day. In sum, the rules were designed to promote policies of the Communications Act, not the Copyright Act; and in applying them the Commission looks to the former policies exclusively, not to the latter. Thus, the Commission's statement that copyright should be an independent, and would be a valuable, adjunct to its rules is plainly well grounded.

IV

While we are in full accord with the Solicitor General's analysis of the "performance" issue, in our view his suggestion of a license implied in law for the carriage by CATV systems of signals within the Grade B contour of the originating station is deficient in law and would be impractical in execution. He does not assert that the Copyright Act, as construed by the Court of Appeals, conflicts with the terms or policies of any other statute. His suggestion that the anti-trust laws "be kept in mind" falls far short of a contention that the implied in law theory springs from those laws. Presumably this is why he does not discuss in any detail the character of the broadcasting, CATV, or copyright industries. Nor does he assert that the Communications Act is the source of the implied in law doctrine; and though petitioner relies upon that statute's policy of "free public reception," as petitioner characterizes it, CATV itself hardly qualifies under that policy. In the end, the Solicitor General's reliance upon "practicalities, equities, and other factors" appears to rest on his view that, because of "the economic realities of the broadcasting industry" respecting such matters as advertising practices, his implied in law theory would not unduly decrease the value of copyrighted material. But this amounts simply to a suggestion that the statute be rewritten in a fashion that, as the Solicitor General concedes, does not square with the legislative purpose as reflected in the statutory provisions themselves. That power to rewrite resides only in the Congress.

Moreover, adoption of the implied in law theory for CATV television retransmission would have untoward consequences. It would, for example, seem to be equally applicable to radio retransmission such as that performed by background music systems like "Muzak," as well as to retransmission of television signals by "repeaters" such as satellites, translators, and boosters.

V

Finally, the petitioner's dark predictions about the future of CATV unless the Court of Appeals is reversed are baseless. The mechanical problems of establishing a licensing system would be no more difficult than other problems that have been solved in the past so as to permit the licensing of copyrighted material by its many and varied users. Nor are petitioner's purported fears about astronomical past damages realistic. First, the history of copyright litigation, in general and with particular reference to CATV, is ample evidence that copyright owners are not interested in the destruction of their prospective licensees. Second, petitioner's argument is rooted in the erroneous assumption that the statutory damages of not less than $250 per infringement would automatically govern. Apart from defenses such as laches and estoppel, which are expressly reserved for trial in this case, this Court has made it clear that in copyright cases the courts have a wide discretion among the remedies of actual damages, accounting, and statutory damages, and that they are to be governed by the equities of the case and the policies of the Act. *Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231, 234 (1952). One of the obviously relevant factors is the degree to which the copyright proprietor has actually been damaged, and this will vary greatly from case to case depending upon the particular facts. In short, the Copyright Act was not designed to require that remorseless retribution be exacted in every case of infringement no matter what the circumstances. Rather, it delegates broad discretion to the trial court. If there is abuse of discretion, the time for correction is later and the place is litigation over that question, not over the threshold issue of infringement.

ARGUMENT

I

The Industries Affected by This Case

The immediate question before the Court is a narrow one: does the CATV system "perform" or "reproduce" a program "in public," as those words are used in the Copyright Act of 1909. It is true that in their electronic functions neither television broadcasting nor CATV transmission bears much resemblance to the common understanding of a "performance." No more do radio broadcasts, motion picture exhibitions, wired music, and many other forms of communication. But the courts have applied the words of the Copyright Act to these new technologies and new industries so that the legislative purpose would be furthered rather than frustrated. *See, e.g., Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911); *Buck* v. *Jewell-LaSalle,* 283 U.S. 191, 196-197 (1931). We undertake, accordingly, a summary description of the technology and the commercial organization of the industries involved in this case.

A. *The Television Industry*

1. *Technology.* The electronic functions of the CATV system are almost indistinguishable from those of a television broadcast station, with the sole exception that the broadcast station transmits its signals through the air and the CATV system through coaxial cable. We do not undertake to summarize the findings of the district court in this case, which contain a very detailed description of television technology (J.A. 40a-59a), but only point their salient teachings.

Television programs originate in (a) a live performance,

(b) a magnetic tape recording which stores for playback the electronic recordations of sight and sound, (c) a motion picture film, or (d) a slide or other static visual material.[1]

The sight and sound of a live performance are used to control a series of electro-magnetic waves, the last of which, shaped so as to permit reconstruction of the original sight and sound, are carried to the broadcast antenna and radiated toward the horizon as electro-magnetic waves.[2]

The process is essentially the same with respect to tape and motion pictures, each of which is used to produce electro-magnetic waves from which the original sight and sound can be reconstructed.[3] While monitor screens are normally used (as is frequently the case with CATV trans-

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[1] See, generally, Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, p. 1224 (1965) (hereinafter cited as "House Hearings"); J.A. 40a.

[2] The electronic detail, though still in brief summary of the district court findings, is that the sight of a live performance is recorded by a television camera, which focuses the scene optically on a photosensitive surface containing elements whose electronic characteristics vary according to the intensity of the light which strikes them. When this surface is "scanned" by a narrow electronic beam, moving in a regular sequence, a pattern of electric voltage is created which varies according to the brightness of each part of the picture. The resulting "video signal" has a wave length and frequency not suitable for broadcast. Accordingly, carrier waves of shorter length and higher frequency are produced. These are modulated by the video signal as to amplitude. Simultaneously the "audio signal" is produced by a microphone which, vibrating according to the air pressures produced by sound, produces electric voltage which varies according to the intensity of the sound. The audio signal is amplified and then used to modulate either the same or a simultaneously produced carrier wave as to frequency. The modulated carrier waves are then amplified, and carried to the antenna for broadcast. (J.A. 40a-44a.)

[3] When the tape is run through a tape playback unit it reproduces the same video and audio signals as were derived from the original live performance, which are then used as described in note 2 to modulate the carrier waves, which after amplification are broadcast. Motion pictures and slides are reproduced within a camera tube which is scanned by an electronic beam as is a live performance, while the sound track activates the audio signal. (J.A. 43a.)

mission), neither picture nor sound need be made visible or audible within the studio.

The home television set receives the waves from the broadcast station on its antenna (or from the CATV system by cable); these are used to shape a further series of electro-magnetic waves the last of which produces the picture and sound of the receiving set.[4]

2. *The Broadcast Station.* The policy of the Communications Act is "to make available, so far as possible, to all the people of the United States a rapid, efficient • • • radio communications service" (47 U.S.C. § 151). It directs the Commission to assign bands of frequencies to classes of stations, to assign the frequency and determine the power for each station, to determine station locations, and authorizes it to establish areas or zones to be served by any station (§ 303(c), (d), (h)). Its licenses are to be granted so "as to provide a fair, efficient, and equitable distribution" of service among the states and communities (§ 307(b)).[5]

In discharge of this responsibility, the Commission in 1952 allocated frequency channels to each of about 850 communities in the United States (47 C.F.R. § 73.606). It did so in explicit recognition that the policy of the Act required it to maximize the number of local community broadcast stations, in order to permit local public service programs and local self-expression not available in broad-

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[4] The incoming waves are used to fix the characteristics of another wave produced at a lower frequency. This wave is then demodulated, to produce signals like those originally made by the camera, which control the scan of an electronic beam which produces varying gradations of light on the photosensitive inner surface of the picture tube. The reproduced audio signal simultaneously is converted into sound by activation of the loud speaker. (J.A. 50a.)

[5] See, *e.g.*, *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 362 (1955).

casts from the major centers. 17 Fed. Reg. 3905, 3912-13 (1952).[6]

There are available for assignment to television broadcast stations 12 very high frequency ("VHF") channels and 70 ultra high frequency ("UHF") channels. Very few additional VHF assignments can be authorized without causing severe interference with the signals of existing stations. The expansion of local commercial and educational television broadcast stations is, therefore, dependent upon use of the UHF channels. UHF faced, however, an almost impossible obstacle in that most receiving sets were able to use only VHF frequencies. The Congress in 1962 accordingly authorized the Commission to require that all receiving sets be equipped to receive UHF as well as VHF signals.[7] One of the major bases of the Commission's concern over the impact of CATV is its fear that it will throttle the continued development of local UHF broadcast stations which had begun to gather momentum after the 1962 legislation.[8]

3. *Service Areas.* Television broadcast is limited in distance to the horizon, with a slight extension due to the

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[6] The Commission's purpose to protect local broadcasting is also effectuated through rules regulating the power and antenna height of broadcast stations and the use of translators and other auxiliary broadcast systems. 47 C.F.R. § 73.614, 689, §§ 74.731-32, 831-32.

[7] 76 Stat. 150, adding 47 U.S.C. §§ 303(s) and 330. The purpose of this unusual legislation was to break the "vicious circle" by which the absence of UHF stations prevented the manufacture of UHF receivers, while the absence of receivers prevented the construction of UHF stations. This was explicitly done in order to stimulate local and educational television broadcast. See H. Rep. No. 1559, p. 5, and S. Rep. No. 1526, p. 5, 87th Cong., 2d Sess.

[8] Second Report and Order, Community Antenna Television Systems, in Docket 15971 *et al*, 2 F.C.C. 2d 724, 31 Fed. Reg. 4540, 4545, 4557-4560 (1966) (hereafter cited as "Second Report").

In 1963 about 7% of TV homes could receive UHF signals, while about 42% could in 1967, according to a U.S. Census Bureau survey as reported in NAB, *1967 Dimensions of Television*, p. 10.

gravitational bending of the electro-magnetic waves. The resulting limitation in the service area of a broadcast station is given rough theoretical definition in the predicted Grade A and Grade B contours estimated under the rules established by the Federal Communications Commission when a station is licensed. These contours are calculated upon a standard assumption as to broadcast station power and antenna height and as to the antenna height and sensitivity of the home receiver, as well as to average terrain and soil conductivity in the area. The Grade A contour marks the boundary where acceptable reception is expected to be available 90 per cent of the time to 70 per cent of the receiver locations. The Grade B contour is the boundary where satisfactory reception is expected to be available to 50 per cent of the receiver locations 90 per cent of the time. (17 Fed. Reg. 3905 (1952)).[9]

The Grade A and B contours have no exact relation to the actual market areas of a television broadcast station. As the Commission recognized in the regulation providing for these contours, "[u]nder actual conditions, the true coverage may vary greatly from these estimates * * *" (47 C.F.R. § 73.684). Again what is an acceptable signal often depends upon the alternative; an indistinct picture may hold its audience if there is no alternative and be ignored if there is a better one available. The clearest example of the irrelevance of the Grade B contours to the market areas of stations is found in the overlapping areas where the broadcast stations of one community have Grade

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[9] In the flat areas of the mid-West, the typical Grade A contour will be 25-30 miles from the broadcast antenna and the Grade B contour 60-75 miles; from Denver both the Grade A and Grade B contours reach only about 1 mile to the mountains in the west and about 60 and 100 miles, respectively, to the east. Television Digest Inc., *Television Factbook, 1967*, pp. 114b, 261b (hereafter cited as "Television Factbook"; the "Service" volume is identified by the letter "a" and the "Station" volume by the letter "b").

A or Grade B contours which include those of another major community. The Washington-Baltimore stations comprise one pair of many such examples; both because of signal clarity and because of local interest, the normal market area of stations in one city does not include homes in the other.[10]

The service area of a broadcast station can be enlarged, in areas where it occasions no interference with other broadcast stations, by the use of "repeater" stations. These can be "booster" stations which retransmit at the same frequency or, more usually, "translators" which retransmit at a different frequency. These stations are low in cost and operated unattended. In addition, there are "satellite" broadcast stations which normally retransmit the signal of a "mother" station but occasionally originate their own programs. Repeater stations, in contrast to cable systems, are not limited by cost to reasonably compact communities nor to those who can afford to subscribe. In 1966, 1,894 translators were in operation.[11] Under Section 325 of the Communications Act, a repeater station cannot rebroadcast without the permission of the station whose signal it retransmits. 47 U.S.C. 325.

4. *Programs and Exclusivity.* Broadcast station programs come from three sources: (a) A network distributes programs, either live or prerecorded, to its affiliated stations usually for simultaneous or, because of time differ-

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[10] Washington is within the Grade A contour of some Baltimore stations and within the Grade B contour of all, and vice versa. *Television Factbook* note 9, pp. 129b-134b, 321b-324b.

Other areas of contour overlap are Boston-Providence, Chicago-Milwaukee, Cleveland-Akron, Toledo-Akron, Toledo-Detroit, Cincinnati-Dayton, Sacramento-San Francisco, Los Angeles-San Diego, Indianapolis-Muncie, Lancaster-Wilkes Barre, Richmond-Norfolk. Hearings on Copyright Law Revision-CATV, before Subcommittee of Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary on S. 1006, 89th Cong., 2d Sess., p. 200 (1966) (hereafter cited as "Senate Hearings").

[11] *FCC Annual Report,* 1966, p. 117.

ences, for same-day broadcast.[12] (b) "Syndicated" programs are licensed by suppliers for individual use and the film or tape is physically distributed for broadcast at a time convenient to the station. (c) Locally originated programs are presented by the station, either live in its studio or from film or tape of a prerecorded performance; the program may be produced by the station or obtained from an outside source.[12a]

The commercial broadcast station derives its principal revenues from advertising. Its advertising rates generally reflect the size of the station's viewing audience within the designated market. This revenue is wholly dependent upon the station's ability to broadcast programs which the home viewer will want to watch. To obtain that audience the station will pay substantial sums, which include copyright fees, for attractive programs.

To maintain audience and revenues, it is indispensable that the broadcast station have the exclusive right over a reasonable period of time to show its program in its service area. This is what the station pays for. It will ordinarily gain fewer viewers for a program which has already and recently been shown. This principle of "exclusivity" has been described by the Federal Communications Commission as "an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs," and as fixing "the fundamental distribution practices which have developed in the * * * industry's competitive program market."[13] It has explained:[14]

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[12] The distribution of programs may be by way of (a) cable or microwave facilities supplied by telephone companies or others; (b) physical distribution of film or tape; or (c) off-the-air reception by nearby stations.

[12a] House Hearings, note 1, p. 1224.

[13] Second Report, note 8, p. 4544; see, also, the explanation of National Association of Broadcasters, Senate Hearings, note 10, p. 111.

[14] Second Report, note 8, p. 4560.

> This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station.

The broadcast industry is organized upon this principle. The networks usually limit the broadcast of a program to one station in each community, thus ensuring exclusivity of their programs within the station's market area. When program material is licensed by a station from other sources, the station is given the exclusive right of performance within its market area for a specified period of time. Without that exclusivity, the program would have a greatly reduced value to the broadcast station, with corresponding reduction in the amount it would pay the program supplier and through him the copyright owner.[15]

Each time a program is televised in a market, a portion of the audience potential for the next showing of that program in that market is diminished. Therefore, the fee that stations are willing to pay to license the rights to show "repeats" or "re-runs" usually diminishes with each successive showing in the particular market.[16] Nonetheless, the "re-run" market is an important source of revenue for the more successful programs, and the copyright owners derive substantial amounts from such license fees. Exclusivity is as important for re-runs as for the original showing.[17]

Any interest that the broadcast station might have in expanding its viewing audience into markets other than its own is limited by the fact that the program suppliers

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[15] Senate Hearings, note 10, p. 171.

[16] House Hearings, note 1, p. 1335; Senate Hearings, note 10, *supra*, pp. 8, 119, 171.

[17] Senate Hearings, note 10, p. 188.

would be likely to require increased fees, while at the same time the station's local advertisers would refuse to increase their payments because they desired coverage only in the station's own local market.[17a]

5. *Copyright.* The copyright system has evolved into a form that represents overall accommodation to the complexities of the television industry. About half of the network programs are covered by statutory copyright.[18] A part of the programs are produced and copyrighted by the networks. The remainder of the copyrighted material is obtained by the networks from several score of independent program producers. The producer usually obtains licenses for the underlying copyrights from the owners. The network copyright licenses cover the broadcast by their affiliated stations.

Virtually all of the stations broadcast so-called "syndicated" programs, which are licensed directly to them by producers and others. The producers include local stations that produce some of their own programs, as well as networks, which sometimes "syndicate" programs after intial network transmission.

Music performed by the network or the broadcast station is licensed independently of the program, under a blanket license, by which for a fixed percentage of revenue the network or station is authorized to play any composition in the repertories of the performing rights organizations.[19]

[17a] Senate Hearings, note 10, pp. 172, 199.

[18] CBS advised the Congress that in a typical week in 1966 some 53% of its broadcast time covered programs which were not copyrighted. Senate Hearings, note 10, p. 224.

[19] There are three societies, each operating in broadly the same manner: American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc. They were formed, many years ago, in order to solve the problem of dealing between thousands of composers and publishers and an equivalent variety of licensees. Senate Hearings, note 10, pp. 130-156.

The copyright system also reaches backward to protect the actors and authors. In the typical case, other than that of the so-called "star," the film actor's compensation derives more from his "rerun" payments than from the payment for his initial performance, and these subsequent payments are dependent upon copyright payments to the producer.[20] The deferred payments to the author work in much the same way, and are similarly paid out of copyright license income.[21]

6. *The Economic Structure of the Industry.* It is estimated that in 1967 some 94% of the households in the country owned a television receiver.[22] There were, at the beginning of 1968, 792 television broadcast stations in the United States, of which 646 were commercial stations, divided into 501 VHF and 145 UHF stations.[23] Most of the commercial stations are affiliated with a network but a growing number are not affiliated.

The Federal Communications Commission has by regulation imposed restrictions upon the ownership of television stations designed to prevent concentration of ownership. For example, no license will be granted to a station which has a Grade B contour which overlaps that of another under the same control, and at a maximum there cannot be more than seven (five VHF) stations under common control. 47 C.F.R. § 73.636.

The larger television broadcast stations are in healthy financial condition.[24] But the smaller stations are in a

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[20] Charlton Heston, President, Screen Actors Guild, Senate Hearings, note 10, pp. 205-210.

[21] Evelyn F. Burkey, Executive Director, Writers Guild of America, Senate Hearings, note 10, pp. 227-230.

[22] Estimate of Advertising Research Foundation, Inc., from U.S. Census Bureau data as given in NAB, *1967 Dimensions of Television,* p. 16.

[23] *Broadcasting,* Feb. 5, 1968, p. 67.

[24] In 1966, 593 television stations earned, before federal tax, $306 million. F.C.C., TV Broadcast Financial Data—1966, Pub. Notice 5317 (Aug. 25, 1967), Table 2.

marginal position; about half of those with gross revenue of less than $400,000 in 1963 were losing money[25] and in 1966 114 UHF stations lost $7,400,000 in the aggregate.[26] In 1966 operations were profitable for 87 per cent of the VHF and for 59 per cent of the UHF stations.[27]

Program expense, including either the cost of production or license fees to an independent producer, is much the heaviest expense of television broadcast. In 1966 it represented 63% of total expense and 49% of total revenue of the industry.[28]

B. *The CATV Industry*

1. *Technology.* The CATV system picks up signals from one or more broadcast stations either by direct reception alone or, if the originating station is distant from the CATV service area, by microwave relay of the signal to the CATV equipment. Over 450 CATV systems now in operation use microwave relays, for distances up to 665 miles from the originating station.[29]

The findings of the district court as to the technology of CATV transmissions are detailed and precise (J.A. 38a-59a, 73a-74a). So far as here important, they show that CATV transmission in its electronic operation is indistinguishable from television broadcast.[30] Indeed, with only a

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[25] Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (Report to F.C.C.), (1965), p. 87 (hereafter cited as "Seiden Report").

[26] F.C.C., TV Broadcast Financial Data—1966, Public Notice 5317, Aug. 25, 1967, Table 2.

[27] *Id.*, p. 1.

[28] *Id.* These statistics are computed from Tables 3 (showing revenues) and 8 (showing expenses). For the networks program costs are 84% of total expense and 77% of total revenue; for the broadcast stations they are 43% of total expense and 29% of total revenues.

[29] Second Report, note 8, p. 4558.

[30] The electromagnetic waves received on the antenna travel on coaxial cables from the antenna to the building at its base which houses the "head end" equipment. This equipment produces carrier waves, more powerful

minor amount of supplemental equipment the CATV equipment can originate live or recorded television programs. At the beginning of 1967 at least 527 CATV systems originated their own programs and the trend is increasing very rapidly.[31]

From the CATV transmitting station the carrier waves are transmitted through coaxial cables. This is a process identical to a broadcast except that the signals are confined to the cable, their field of radiation being constricted by the electro-conductive core and circumference of the cable. Trunk line cable is used to carry the signals to the community to be served. Distribution cables lead off from the trunk line and individual "house drop" cables extend from the distribution cable to the home of the subscriber. The signal becomes progressively weaker as it goes through the cable and it is necessary to insert amplifiers at regular intervals along the trunk line and distribution cables. The two systems operated by petitioner utilize 665 miles of cable and 1,017 amplifiers; the amplifiers require the use of 2,000-3,000 vacuum tubes, as contrasted to the 150 tubes used in the ordinary broadcast station. (J.A. 51a-52a.)

Each CATV channel can carry the signal of one broadcast station. Until 1962 the majority of the CATV installations had a capacity to receive and retransmit 5 channels; from 1963 onward the majority being installed had a 12-

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than those received, which are modulated in vacuum tubes or transistors to duplicate the amplitude and frequency characteristics of the signals received. (J.A. 46a-47a.) The equipment includes, or can include, a device to cut off any program on any channel. (Senate Hearings, note 10, p. 112.)

[31] The 527 stations were 36% of the 1440 CATV systems reporting to the FCC; "informed sources agree that program origination by CATV was negligible until" 1967. *Broadcasters and CATV*, Triangle Publications, Inc. (a major CATV operator), Jan., 1968, p. 10.

channel capacity.[32] The CATV industry is generally being rebuilt into a 12-channel capacity.[33] CATV systems with 20 or more channels are planned.[34]

2. *Economic Structure.* The first commercial CATV system was installed in 1949.[35] By the beginning of 1967 there were 1,770 systems in operation with 2,100,000 subscribers.[36] The Commission has characterized the development of CATV as one of "explosive growth and changing character."[38] The Register of Copyrights has described CATV as "the fastest growing mass communications medium on the American scene."[39] The Commission, while not accepting the estimates as necessarily correct, has noted the statement of the leaders of the CATV industry that "almost all American cities—small and large—will be wired for television," that "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable," or, more conservatively, that within that period "CATV may reach 30 to 35 million households."[40]

The capital costs of a CATV system are directly related to the length of cable installation, and thus to the number of anticipated subscribers. The CATV systems studied for the Federal Communications Commission showed capital costs in 1964 which ranged from $150,000 to $1,163,000.[41] A pending franchise application for the Philadelphia area

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[32] Second Report, note 8, p. 4545.
[33] Senate Hearings, note 10, p. 101.
[34] *Id.*, p. 122.
[35] Senate Hearings, note 10, p. 85.
[36] *Television Factbook, 1967,* note 9, p. 54a.
[38] Second Report, note 8, p. 4545.
[39] Senate Hearings, note 10, p. 10.
[40] Second Report, note 8, p. 4558.
[41] Seiden Report, note 25, pp. 24-25.

involves an initial investment of $37,000,000 and is designed to serve 200,000 customers.[42]

While CATV capital costs are high, so are the profits. On a cash flow basis, excluding interest and depreciation, a group of 28 CATV systems studied for the Commission showed a weighted average profit amounting to 57% of gross revenue.[43] This high rate of profit is, of course, related to the fact that the CATV system has so far enjoyed a program cost of zero, while this expense accounts for 49 cents of every dollar of revenue in the broadcast industry (*supra*, p. 21).

The ordinary CATV system seeks to expand its patronage and to hold its existing subscribers through advertising its services. The district court found in this case that "defendant's activities in promoting and advertising television programs on its cables were similar to the promotional and advertising activities of a television broadcasting station."[44] The fragmentary data available suggest that annual CATV advertising expenditure is in the neighborhood of $1 to $2 million a year.[45]

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[42] Senate Hearings, note 10, p. 171; see, also, the Commission's reference to a proposed $40 million investment, Second Report, note 8, p. 4558.

[43] Median expense figures for the 28 systems show the following percentages of gross revenues: salary, 15%; pole rent, 3%; advertising, 1%; maintenance, 3%; franchise tax, 4%; and microwave (for the 15 systems using), 8%. Seiden Report, note 25, pp. 27-31.

[44] The detail of his findings were: "By means of newspapers, radio and by direct mail, they advertised the variety of programs transmitted; • • • that the choice of all three networks was available only to their subscribers; • • • that certain programs • • • could be seen only on the cable • • • • [and that] without subscribing to its system, homeowners in Clarksburg were 'chained to one channel' • • •." (J.A. 34a-35a.)

[45] The Seiden Report indicates that in 1965 the CATV systems studied spent about 1 per cent of their gross revenues on advertising (note 43) while the House Committee report estimates annual CATV revenues at $150,000,000. H. R. Rep. No. 2237, 89th Cong., 2d Sess., p. 78 (1966).

Multiple ownership of CATV systems is common. A tabulation in 1966 showed 25 group owners of CATV systems controlling 671 franchises, with 394 applications pending; groups up to 41 systems were under common ownership.[46]

CATV is, in short, a major business activity. The Commission has said that the long-distance CATV systems "cannot seriously be argued * * * to * * * represent master TV antenna arrangements" and that such a characterization "does not withstand analysis."[47] The Register of Copyrights has considered it a "mass communications medium."[48] The House Committee on the Judiciary, noting CATV "annual revenue of over $150 million," found that the "increasing size and impact of community antenna operations have raised difficult problems of law and policy."[49] Finally, the district court has in this case specifically found that petitioner's systems are "large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs" (JA 20a).

3. *Types of CATV.* Petitioner and supporting *amicus curiae* present their argument in terms of a generalized, prototypical CATV system. In fact, however, the varieties of CATV systems in operation are strikingly different. They fall into at least five categories:

(a) *Local.* In the early years of its development CATV

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[46] The largest owner was Jerrold Corp. with 41 systems. Senate Hearings, note 10, pp. 238-239.

It appears, indeed, that petitioner is now owned by American Cablevision Co., one of the larger group owners. Television Factbook, note 9, p. 544a; Senate Hearings, note 10, p. 238.

[47] Second Report, note 8, p. 4561.

[48] Senate Hearings, note 10, p. 10.

[49] H. R. Rep. No. 2237, 89th Cong., 2d Sess., p. 78 (1966).

served largely as a supplement to the local broadcast station, carrying its signals to communities within its market area which, because of terrain or other reasons, could not receive satisfactory signals by direct broadcast from the station.[50]

This local CATV performs a valuable service,[51] though subject to two limitations which inhere in the nature of any CATV system. It is not, in contrast to station or repeater broadcast, useful in service of sparsely populated rural areas because a reasonably concentrated population is necessary to warrant the cost of cable.[52] In the second place, with a substantial installation charge and monthly subscription charges of $5 or $6, CATV is not useful to those who cannot afford this charge.[53]

(b) *Metropolitan.* The comparatively recent development of CATV systems designed to improve reception in the large metropolitan cities is as a technological matter essentially similar to the provision of a supplemental service in the mountain community. In parts of New York City, for example, television reception is often poor and two well-financed CATV systems began operations in 1966.[54] While technologically similar to local CATV, there may well be markedly different copyright implications with respect to metropolitan CATV. If most New York City homes come to be served by CATV, it would be at least anomalous that the medium of communication with much

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[50] Corry, *Community Antenna Television: An Economic Survey*, 2-3 (Cong. Leg. Ref. Serv. 1965) (hereafter cited as "Corry").

[51] Second Report, note 8, pp. 4544, 4548, 4562; Senate Hearings, note 10, p. 110.

[52] Seiden Report, note 25, p. 83; Second Report, note 8, pp. 4544, 4559.

[53] Second Report, note 8, p. 4550; Senate Hearings, note 10, p. 115.

[54] *Television Factbook, 1967*, note 9, pp. 454a, 459a. New York City will not grant a franchise except to a CATV system which confines itself to local, off-the-air programs. Senate Hearings, note 10, pp. 92, 116-117.

the greater revenues should bear no part of the program cost.[55]

(c) *Unserved Areas.* Some CATV systems import signals into communities which have no off-the-air reception at all. This obviously injures no existing broadcast station. It does, however, represent a use of the copyright owner's property to which he has not consented and for which he has not been paid.[56] It serves, moreover, to inhibit the construction of new UHF local broadcast stations, which would also serve the surrounding rural area and those unable to pay the CATV charges, and is accordingly a matter of concern to the Commission and the industry and copyright owners.[57]

(d) *Underserved Areas.* Adequate television service is usually considered to be the ability to receive satisfactorily stations carrying the three networks.[58] The importation of distant signals into an underserved community has the same effect upon the copyright owner and the same tendency to inhibit new UHF construction which was noted with respect to the unserved area. It has in addition an adverse effect upon the local broadcast stations serving the community.

(e) *Imports from Distant Markets.* There is, finally, the distant CATV system which imports programs from other markets and distributes them within the market area which is adequately served by the local broadcast stations. A pending franchise application to distribute New York City programs to the Philadelphia market by means of a

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[55] In 1963 the average broadcast station was estimated to derive in advertising revenue about $1.50 per month per TV home. Seiden Report, note 25, p. 27. The New York CATV subscription rate is to be $5.50 per month (Corry, note 50, p. 9), or $66 per home per year.

[56] Senate Hearings, note 10, p. 116.

[57] Second Report, note 8, pp. 4559-60.

[58] See Seiden Report, note 25, p. 16.

$37 million CATV system (*supra*, pp. 23-24) is one of many illustrations. Another is a planned Denver CATV system which will have 19 channels, including 5 Denver, 8 Los Angeles, and 2 San Francisco stations.[59] This type of CATV, as we show below, is severely injurious to the copyright owner, to the "invaded" television stations, and to the objectives of the Communications Act.

(f) *Numerical Distribution.* We have found no satisfactory statistical data by which to assign the CATV systems to each of these several types of operations, but there are obviously many examples of each. It is also true that in many instances a single CATV system will include operations which fall into two or more of the separate categories.[60]

4. *The Consequences of CATV.* Each of the groups concerned with television broadcasting is injured, in a degree varying from trifling to catastrophic, by some but not necessarily by all of the forms of CATV systems:

(a) *Copyright Owner.* The copyright owner who has sold exclusive performance rights within one broadcast market area expects or hopes to sell those rights within other areas as well. When a CATV system imports the copyrighted program into another market area, the copyright owner's market in that area is eliminated after that performance or is at best greatly diminished. According to the spokesman for the leading film producers, "When

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[59] FCC, Public Notice No. 12154, Feb. 6, 1968.

[60] According to an estimate supplied by the National Community Television Association, based on a 725 system sample in 1964-1965, the 1650 systems in operation in 1966 would be divided into 152 systems which distributed only local signals (received within the Grade B contour of the originating station), 405 systems which distributed only distant signals (although 81 were within some station's Grade B contour), and 1111 systems which received and distributed both local and distant signals. Senate Hearings, note 10, pp. 95-96.

the bloom is off the rose, its value always drops precipitously." [61] The CATV industry itself has recognized that this is unfairly injurious to the copyright owner. Its representative has recognized that "it would put us in the position to dissipate his property value * * * before he had the opportunity to exploit it himself," and has testified:[62]

> In this situation, the CATV system, by definition, is furnishing programs to a group of viewers who are not regarded by the copyright owners as being the normal recipients of the service from the station which has secured a license from the copyright owner. Under these circumstances we are willing to concede that a license from the copyright owners should be required.

The copyright owner suffers also the more traditional injury of lost income through other forms of CATV operation, even though they may not involve this direct destruction of potential markets. CATV transmission to otherwise unserved or underserved markets takes the copyrighted work for sale to audiences for whom the copyright owner has not consented and has not been paid.

Even in the case of local CATV, which brings the program to homes within the market area for which the broadcast station has contracted, there may be damage to the copyright owner. Although he has consented to broadcast use, he may not have consented to another use of his work for which the CATV subscribers have paid the CATV system. This sort of damage cannot be appraised in the abstract, but only on the facts of an individual case, including in particular the terms of the agreement between the copyright licensor and the broadcast station.

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[61] House Hearings, note 11, p. 1335. See, also, Senate Hearings, note 10, pp. 8, 78, 79, 119, 121, 188, 201.

[62] Senate Hearings, note 10, pp. 87, 91.

(b) *The Broadcast Station.* The broadcast station whose normal market area is invaded by CATV transmission of distant programs is, in the words of the Federal Communications Commission, subjected to "most unfair" competition and to a "gross inequity;" [63] its Chairman has characterized the distant CATV operation as "unfair and potentially destructive competition." [64] The unfair competition takes two forms: The most direct injury is inflicted when the local station has paid for exclusive performance rights in its service area and finds its audience dissipated because a CATV system imports and distributes the same program.[65] That damage is especially grave when the CATV retransmission occurs, not simultaneously with the local station's broadcast of the program, but beforehand. Injury arises in a more general fashion whenever the local broadcast station must compete for viewers with a CATV system which has imported without cost programs picked up from larger metropolitan stations.[66] The loss of a viewing market, and thus the loss of advertising revenues, is accentuated when, as is not uncommon, the CATV connection with the subscriber's set is made so as to preclude

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[63] Second Report, note 8, p. 4561.

[64] Senate Hearings, note 10, p. 78.

[65] See Second Report, note 8, pp. 4544, 4561; Senate Hearings, note 10, pp. 78, 111. This injury is not confined to local broadcast stations. The producer commonly does not recover his production costs and copyright fee on the first showing, and depends upon subsequent syndication for his profit. Senate Hearings, note 10, p. 188.

[66] Second Report, note 8, pp. 4544, 4561. The impact of distant CATV is too recent to permit any close measurement of the loss of advertising revenues, but is nonetheless real. Second Report, note 8, p. 4544. In addition it was felt, in 1965, that the phenomenon was too recent yet to be fully appreciated by the advertisers. Seiden Report, note 25, pp. 64-66. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F. 2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951, where upon an evidentiary record the Commission found unrestricted growth of CATV systems would substantially eliminate revenues essential to the local broadcast station.

off-the-air reception, or when the CATV system does not carry the local broadcast program to its subscribers.[67]

It may be noted that, while the Commission's policy may vary in the two cases, the local broadcast station is equally injured by the distant CATV system whether the invaded area is adequately or inadequately served under the Commission's standards.

There is no immediately discernible injury to the local broadcast station from a CATV system which only distributes signals of that station and other stations serving the same market area. But if the CATV system were to substitute its own for the station's advertising, the injury would be evident. Or if the CATV system originates some of its own programs it is exploiting an audience which has largely been built up by its costless use of the local station's programs, and it seems to the NAB unfair that the local station should have its audience diluted by competition which it considers parasitic.

(c) *Public Interest.* The Commission has found its policies threatened by CATV not only in its injury to existing broadcast stations but in its stifling effect on potential UHF development. CATV systems have tended to concentrate in areas where adequate service can be realized only through UHF broadcast stations, and their exploitation of the local market discourages the needed UHF construction.[68] This threatens the policy of the Communications Act and of the Commission to encourage the development of local broadcasting in order to afford full facilities

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[67] Second Report, note 8, p. 4544. In 1964, prior to the Commission's rule requiring local carriage, a survey showed 433 CATV systems carried the local broadcast programs (Grade A and B contours combined) while 168 did not. Seiden Report, note 25, p. 75. The Commission in its First Report and Order in Docket No. 14895 *et al.*, 38 F.C.C. 683, 702-703 (1965), noted that many CATV systems did not afford their subscribers the choice between cable and off-the-air reception.

[68] See, generally, Second Report, note 8, pp. 4544, 4559-4560.

for local public service programs and announcements and to encourage local self-expression.[69]

Finally, the inherent limitations of CATV operate against the public interest when a CATV system serves to preclude establishment of broadcast service. In place of free broadcasts, service is delivered only at the cost of a substantial installation fee and charges of $5 to $6 a month. In place of a broadcast service, reaching all homes however isolated within the service area, there is substituted a cable service which cannot feasibly be installed except within a reasonably compact community.

(d) *The Future.* These are the dangers which are believed now to be presented by the CATV systems. The alarm of the Commission, of the broadcast industry and of the copyright holders is yet directed more to the future than to the present. Local franchises have been granted, or are under application, under which CATV systems would import New York broadcasts to Philadelphia, and Los Angeles and San Francisco broadcasts to Denver (*supra,* pp. 27-28). It is feared that if CATV realizes the potential which the industry has claimed (*supra,* p. 23), the great bulk of the programs for the entire country will before long be distributed from New York and Los Angeles, bypassing local stations, to the injury or ruin of both the copyright owner and the local broadcaster.[70] Such a wire service would be equally destructive of the statutory and Commission objectives to foster local service, free television, and service to rural as well as urban homes.

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[69] See preceding footnote.

[70] Second Report, note 8, p. 4561; Senate Hearings, note 10, pp. 113, 170-171, 121-22.

C. *Moves Toward Solution*

It is evident that the explosive development of the CATV systems has presented to all concerned problems of the utmost gravity and difficulty. The Register of Copyrights has said that the legislative "need is for a reasonable, well-considered compromise, and for a fair-minded, flexible approach on the part of all the interests affected in working toward it."[71] In that spirit, we believe, the agencies of government are moving toward at least a tolerable and perhaps a satisfactory solution of some of the novel and important issues consequent upon the accelerating spread of the CATV system of television distribution.

1. *The Commission.* It is unnecessary, since *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, are to be argued with this case, to detail the course of the Federal Communications Commission's attack upon this problem. We explain, in Part III of our argument, that the Commission regulations do not and are not intended to deal with the copyright issues, and that the decision of the court below lends valuable reinforcement to the Commission's objectives.

2. *The Congress.* A general revision of the copyright law, proposed by the Register of Copyrights, was introduced in 1964, but no final action has yet been taken by the Congress.[72] The CATV issue is considerably the most complex and difficult of the issues considered in the Copyright

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[71] Senate Hearings, note 10, p. 10.

[72] H.R. 11947 and S. 3008, 88th Cong., 2d Sess. (1964). The bills were reintroduced in the 89th Congress. H.R. 4347 and S. 1006 1st and 2d Sess., 1965 and 1966, respectively. Both the House and the Senate Committees held extensive hearings and similar bills were introduced in the 90th Congress. The House bill, H.R. 2512, was reported out and passed the House in the first session (113 Cong. Rec. H 3888 (daily ed. April 11, 1967)); no action has yet been taken by the Senate Committee.

Revision bill. The Register of Copyrights has taken the position that, despite difficulties of administration, CATV systems should be liable for copyright infringement.[73] Section 101 of the current copyright revision bills accordingly serves to continue CATV copyright liability by defining public performance to mean "to transmit or otherwise communicate * * * by means of any device."

The House Committee on the Judiciary, as Section 111 of the bill, proposed an elaborate and graduated limitation of CATV copyright liability.[74] In the course of floor debate it was stricken by the House in order to allow Commerce Committee consideration, and the bill passed with absolute CATV liability continued by Section 101.[75] In the Senate, S. 597 was introduced in a form identical with the copyright revision bill reported by the House Committee, and accordingly contained section 111.[76] The Senate Committee has not yet reported the bill out.

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[73] Deputy Register of Copyrights, Supplementary Report of the Register of Copyrights: 1965 Revision Bill, p. 42; Statement of House Hearings, note 1, p. 42.

[74] Section 111 as reported by the House Committee exempts from copyright liability those CATV systems which are transmitting local signals within their normal service area and which do not originate programs of their own. It provides for compulsory licensing and payment of reasonable royalties when CATV extends a signal beyond that area and into an inadequately served area. It further provides for full liability and free negotiation of copyright licenses when the CATV extends a signal beyond its normal service area and into an adequately served area. In addition, a copyright proprietor can give any CATV operator importing a distant signal notice that the local broadcaster has exclusive right to the program. If the CATV operator carries the distant program he is fully liable, whether he operates in an adequately or inadequately served area. Likewise, where normal service areas overlap, the copyright holder can protect the exclusivity of the local broadcasters in the overlap by giving the CATV system notice of the exclusivity. H.R. Rep. No. 2237, 89th Cong., 2d Sess., pp. 7-9, 77-88 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess., p. 6 (1967).

[75] 113 Cong. Rec. H, 3646-47, 3859, 3888 (daily ed., April 6, 11, 1967).

[76] 113 Cong. Rec. S-632 (daily ed., January 23, 1967).

II

Petitioner Has "Performed" or "Reproduced" the Copyrighted Work "in Public"

Section 1 of the Copyright Act gives to respondent the exclusive right—

> (c) * * * to play or perform it [the copyrighted nondramatic work] in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. * * *
>
> (d) To perform or represent the copyrighted work publicly if it be a drama * * *; to make * * * any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * *.

The tautology of the statutory language is abundant evidence that the Act was intended to reach *every* public use of the copyrighted work "by any method whatsoever." If there be any unlicensed public use of the work which is not an infringement, it would have escaped through the fence of the many reinforcing words accumulated in § 1(c) and (d). Most certainly the CATV system can make no such escape.[76a]

A. *The Practical Facts*

The CATV system from any practical view cannot be considered as beyond the broad sweep of the statutory words.

[76a] While the Solicitor General stresses both the term "perform" and the term "reproduce" (Mem. pp. 3, 5), petitioner evidently considers the latter term irrelevant (Br. p. 28 n. 23). The Solicitor General is correct. In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 200, 201 (1931), the Court stated that "the reception of a radio broadcast and its translation into audible sound . . . is essentially a reproduction," and that "[r]eproduction in both cases amounts to a performance."

1. Quite obviously Section 1(c) and (d) cannot be confined to the lay or "ordinary" use of the word "performance," in the sense of an actor on a stage. Congress used too many words, of all-encompassing scope. Moreover, if shaping electro-magnetic waves so that they convey a signal to be translated into sight and sound should be held not to be "performance" or "reproduction," then there would develop a massive destruction of the rights granted by the Copyright Act. This could unsettle the practices of many industries and threaten ruin to the producers, actors, authors, and supporting personnel whose livelihood rests upon copyright protection. Television broadcasters and networks, radio broadcasters and networks, and conceivably even newspapers and magazines printed by remote cable, would all seem able to claim immunity because their reproduction was done by electromagnetic waves and not by pencil or machine.

2. In particular, no basis can be suggested by which the identical electronic processes of the broadcast station and of the CATV transmitter (*supra*, pp. 11-13, 21-23) can be held a "performance" or "reproduction" in the one case and not in the other. Nor is it easy to see a relevant difference between CATV retransmission of broadcast signals and the local broadcast station's retransmission of network signals.

3. We have in CATV no humble adjunct to a home receiver. The cable systems usually involve very substantial capital costs (*supra*, p. 24). The typical CATV system is actively engaged in advertising and is in aggressive search of new subscribers to whom it may offer the programs paid for by others (*supra* p. 24). The rate of return for CATV operations, with an average cash flow of 57 per cent (*supra*, p. 24), is fabulous by most commercial standards. The industry, apparently including petitioner itself, is coming in-

creasingly under the control of large corporate multi-system owners (*supra*, pp. 24-25 n. 46).

4. The programs transmitted by CATV are costly to the television broadcaster; 49% of the industry's revenue is spent in their acquisition (*supra*, p. 21). It would be an extraordinary perversion of the copyright law to allow those programs to be gathered free by the CATV system for sale on a large scale to its own subscribers.

5. The conclusion without more would be that this is precisely the sort of activity for which the copyright owner can demand a license for the use of his work. But the practical case for CATV liability does not stop with its own role as a merchandiser of others' programs. When distant television signals are brought into a local area, they destroy or injure the copyright owners' market in that area (*supra*, pp. 28-29). It is not every litigant who urges that he not only has a right to another's property but also has the right to use that property so as to destroy or dilute its value to the owner.

6. Beyond the copyright owner's injury, the distant CATV is inflicting major injury on the local broadcast station whose market is invaded by exhibition of the very programs for which the local broadcaster has purchased exclusive rights, and in addition by offering unpaid program competition from stations in large metropolitan areas for the other programs which the station has bought or produced for its local audience (*supra*, pp. 30-31).

7. Finally, this freedom from the ordinary obligation to purchase programs is in effect a compulsory subsidy from the copyright owner and the broadcast station enabling the distant CATV system to threaten basic policies of the Federal Communications Act. Local self-expression, service to those of modest means, service to rural areas, all require the local broadcast station. CATV inhibits the development of local UHF stations and threatens the con-

tinuance of some now in operation (*supra*, pp. 31-32). Copyright exemption in such circumstances is hardly compelled as a matter of policy.

8. The petitioner seeks to brush these matters aside by a strained analogy and by a forecast of ruin if copyright liability be recognized.

The analogy is to the apartment house master antenna. It is inapt. The apartment owner who erects a single antenna is not in the business of selling programs. He has no elaborate transmission facility that is the virtual duplicate of the broadcast station. He does not advertise his programs to the public. He forecloses no market for the copyright owner nor does he injure a broadcast station. He simply supplies an antenna, as he supplies a refrigerator, stove and electric light, as a part of the furnishing of the apartment that is more sensibily done by landlord than by tenant.

Petitioner's forecast of CATV ruin under the impact of damages for past infringement was heavily stressed in its petition but has only subdued and incidental mention in its brief on the merits. As we explain in the final part of this brief, the forecast can only rest upon an erroneous assumption that the courts will abandon their discretion in the award of a money judgment and will substitute instead a rigid rule that all the various forms of CATV operations in all the diverse copyright relations are to be punished as indistinguishable infringements.

B. *The Law of Infringement*

We see no occasion to make our own statement of the case law which has without exception kept the broad reach of the Copyright Act abreast of the expanding technology of this century. The law has received thoughtful attention in the courts below. It is succinctly but forcefully developed by the Solicitor General in his Memorandum for

the United States (pp. 2-5) and will, we anticipate, be explained in depth by the respondent. These arguments we adopt, without redundant amplification.

III

Relevance of the Federal Communications Act and the Commission's Rules

This Court in *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, will consider the validity of the rules that the Federal Communications Commission has promulgated in order to regulate CATV operations. Strictly speaking, only if those rules were incompatible with CATV copyright liability would they be pertinent to the questions presented in this case. We show below that they are not incompatible, but rather are complementary, and we show also that the rules cannot eliminate the need for subjecting CATV to copyright liability in order to protect the legitimate interests of the copyright owners and the broadcast stations.

1. *There is No Conflict.* Petitioner's contention that the Commission's rules are in conflict with the lower court's decision in this case founders upon the Commission's contrary declarations. Thus, in its report announcing the regulations, the Commission stated that its

> decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems * * *. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in our first report, have to revise our rules.[77]

[77] Second Report, note 8, p. 4557.

The Commission has, indeed, directly answered the only contention by petitioner that specifically identifies an asserted conflict—the contention that "[w]hereas the F.C.C.'s 'carriage rule' requires a CATV system to carry, upon request, the signal of a station within whose B contour it is located, the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage" (Br. p. 71). But the Commission has specifically ruled that stations cannot assert the carriage requirements of the rules and still maintain the right to proceed against the CATV system for copyright infringement. A station making such a request "must confer such [copyright] authorization as may be required from it."[78]

Petitioner also argues more generally that copyright liability would conflict with the Communications Act's policy of "free public access to broadcasts" (Br. p. 80). But of course CATV, in light of its substantial charges to subscribers, hardly accords with that policy either, as petitioner interprets it. More importantly, petitioner's argument proves too much, for under it the broadcasters, as well as the CATV systems, should be free of copyright license requirements.[79]

2. *Copyright Protection Remains Necessary.* The Com-

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[78] Reconsideration of Second Report and Order, 6 FCC 2d 309, 8 Pike & Fischer, RR 2d 1677, 1685 (1967); *Berks TV Cable Co.*, 9 Pike & Fischer, RR 2d 664, 665 (1967). See also Second Report, note 8, p. 4557, n. 51a (". . . [S]tations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules."). It may also be noted that, insofar as the Commission's rules require deletion of programming, there is of course no conflict with the copyright laws. *Green Mountain Television Corp.*, 9 Pike & Fischer RR 2d 231 (1967); *Robins Telecable Corp.*, 9 Pike & Fischer RR 2d 267 (1967).

[79] The sole legislative history cited by petitioner—the remarks of Senator Dill (Br. p. 80)—were addressed to the freedom of broadcasting from charges *by the Government.* See 67 Cong. Rec. 12335, 12352 (June 30, 1926).

mission rules will serve in some measure to protect copyrighted materials from unlicensed exploitation by CATV. But they do not by any means obviate the necessity for copyright protection, for the regulations afford such protection only accidentally and partially.

The Commission rules do not, and could not, provide any protection for the copyright owner himself. They afford him no way to control the use of his work, nor to receive payment for its use. They offer only incidental and incomplete protection against destruction of his markets by unlicensed CATV importation from distant areas.

To the extent the Commission's rules protect the local station and to an incidental degree the copyright owner, they do so by virtue of the "local carriage," "non-duplication," and "distant signal" principles. The first two are embodied in Rule 74.1103. That rule requires a CATV system, subject to numerous and intricate exceptions, on request to carry the local broadcaster's programs and to avoid duplicating those programs by importing the same program from a distant station. The most important deficiency in the rule is that duplication is forbidden only during the 24-hour period in which the local broadcaster presents the program. Because most network programming, unlike syndicated programming, is released to the local broadcasters on the same day, this rule is considered by the Commission to afford adequate exclusivity for those network programs. But it offers protection to no other type of program. Syndicated programming—feature films, series reruns—is broadcast at the convenience of each local broadcaster, and accordingly the twenty-four hour limitation on duplication clearly does not prevent the CATV operator from showing syndicated programs originating in distant markets before they are presented by the local broadcaster. Rule 74.1103, therefore, does not protect the unaffiliated stations; it does not protect the non-network

programming of affiliated stations; and it does not protect those stations affiliated with more than one network, who must store programs more than 24 hours for delayed broadcasting.[80]

Nor does the "distant signal" rule, Rule 74.1107, solve the problem. It prohibits importation of a distant signal into the Grade A contour of any station operating in the 100 largest markets without notice and an opportunity for a hearing.[81] This rule, however, does not apply to more than 1500 CATV systems operating prior to February 15, 1966, because they were "grandfathered" by the provision. Moreover, the rule is frequently waived without hearing, as seems permissible under Rule 74.1109.[82]

Aside from these substantial deficiencies, the public interest hearing required by the rule is not suitable for determining the issue of program exclusivity. The rule is not in any way directed to the interests of copyright proprietors. The hearings decide only the broad issue of whether a CATV operator shall be allowed to import a distant signal at all. Even if importation is deemed in the public interest, it does not follow that the CATV operator should be permitted to import these signals when they are carry-

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[80] Second Report, note 8, p. 4549. Delayed broadcasting occurs most frequently in markets having one or two stations. It represents 5½ and 11 hours respectively of the median station's weekly programming.

[81] While Rule 74.1107 purportedly requires a hearing when a CATV system seeks to extend distant signals into the Grade A contour of the top 100 markets, it also permits a hearing, upon motion by the Commission or petition, when CATV seeks to extend any signal beyond its Grade B contour.

[82] For example, see *Channel 9 Syracuse, Inc.* v. *FCC*, 385 F. 2d 969, 975 (D.C. Cir., 1967), where the Commission waived its rules and permitted three CATV systems to import a total of 10 non-network signals from New York and one signal from Canada into the Grade A contour of Syracuse broadcasters. The Syracuse area is the 35th largest television market and is served by 3 VHF and 2 UHF stations. The Court of Appeals reluctantly affirmed the Commission and strongly suggested that "the Commission should require greater factual specificity in petitions for waiver and in the proof, and in its decisions should more clearly articulate the public interest considerations on which it determines to waive."

ing programs which the local broadcaster has himself arranged to broadcast. Yet in this case the Commission's regulations provide only 24-hour protection against duplication. It is evident, therefore, that Rule 74.1107 is not proportioned to the needs of local broadcasters. They must either oppose the importation of all distant signals or rely solely upon the very limited protection of the 24-hour nonduplication provision of Rule 74.1103.

The Commission has itself recognized that, in view of the evident limitations upon its power to make fully discriminating regulation of CATV operations, complementary reliance upon the copyright law is both appropriate and desirable. This is most clearly shown in the Commission's abandonment of its attempts to provide adequate exclusivity for syndicated programs. It explained that its initial proposal to allow a 15-day exclusivity was being withdrawn not because it was unnecessary but because it was ineffective with respect to syndicated material. It continued:

> Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. * * * As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) [requiring permission of the originating station] to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program market place.[83]

But if amendment of the rebroadcasting provision might assist in "achieving fair recognition of the exclusivity contracts of the program market place," plainly copyright

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[83] Second Report, note 8, p. 4549.

recognition would do the job more effectively.[84] Thus, in his testimony before the Senate on copyright revision, Chairman Hyde, while noting the division of opinion among the Commissioners respecting the Commission's rules, added:

> However, there is far greater unanimity in the Commission that copyright considerations should play an instrumental role in the CATV field and that the resolution of the copyright problem may have a most significant effect upon the CATV regulatory program which we have recently adopted.[85]

And in its March 31, 1967, report on H.R. 2512, the Copyright Revision bill, the Commission expressed even more strongly its opposition to outright exemption of CATV from copyright liability and the importance to the Commission of the play of the copyright market:

> "H.R. 2512 would eliminate this crucial element of unfair competition. It would insure CATV operation within established copyright requirements, and thus, in effect, make the market place play a major role in regulating the conduct of CATV vis-a-vis broadcast outlets. At the same time the bill is carefully fashioned to permit CATV to continue to fulfill its important role of bringing needed service to areas which are underserved either because of their terrain, remoteness, or sparse population. The Commission believes that enactment of a bill along the lines of H.R. 2512 would contribute very greatly to the effective and fair integration of CATV into the

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[84] Rebroadcast permission is given by the originating station, while the station which is injured is that whose territory is invaded. This can at times produce unsatisfactory results. See *Laramie Plains Antenna TV Association*, FCC File No. BPTTV-2774-76, Jan. 12, 1968.

[85] Senate Hearings, note 10, p. 14.

television structure of the country. It would also benefit the Commission by shifting a major portion of the regulatory burden from the agency to the market place, where it more properly belongs.[86]

IV

Petitioner Has No License Implied in Law

On his first view of the case, in connection with his recommendation that the Court vacate the grant of certiorari and hold the petition pending legislative action, the Solicitor General suggested that anything but a "simple 'yes' or 'no' answer" to the copyright infringement issue was within the province of the Congress but not of the courts (Mem. p. 2). The Solicitor General now, however, has changed his mind. He suggests that there be implied as a matter of law "a license for CATV carriage of signals within the normal service area of the originating station," that area to be defined as the station's predicted Grade B contour. We submit that any such determination would be the creature of judicial invention, not judicial construction.

The Solicitor General candidly concedes that there is a "significant lack of precedent" for the doctrine he advances. Indeed, he himself effectively distinguishes the few cases that might conceivably be thought relevant.[87]

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[86] Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong. 1st Sess. ser. 90-1, p. 574 (1967).

[87] The Solicitor General does term the "fair use" doctrine "analogous"—a doctrine that, he notes rather ambiguously, applies to "certain acts of copying" (Mem. p. 8 n. 5). It has been argued that the doctrine extends only to insubstantial copying or use, not to the copying or performance of an entire work. *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 272 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111; *Benny* v. *Loew's Inc.*, 239 F. 2d 532, 536 (9th Cir. 1956), *aff'd by equally divided Court*, 356 U.S. 43 (1958). *Cf. Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306-310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th

But of course lack of precedent, while certainly suggestive, is not decisive. What *is* decisive is that, even giving all of the factors mentioned by the Solicitor General precisely the weight he assigns them, it is plain that those factors do not support the judicial action he recommends.

To begin with, the Solicitor General concedes that there is not any provision of the Copyright Act that can be construed so as to support the implied in law limitation upon the copyright proprietor's rights. As he persuasively and correctly asserts, the only relevant provisions, Sections 1(c) and 1(d), cannot fairly be read except as embracing all CATV transmission. Nonetheless, he recommends that "a rule of law [be] fashioned by the courts in order to take care of practicalities, equities, and other factors * * *". (Mem. p. 6).

But obviously the courts cannot disregard statutes simply on the basis of their view of the "practicalities, equities, and other factors." What the courts *can* do, to be sure, is to limit the broad sweep of a statute on the ground that the Congress has enacted other statutes that cannot otherwise be given their full play, and because it can fairly be concluded that the Congress intended that in cases of conflict the one statutory scheme be preferred to the other. But what is notably absent from the Solicitor General's discussion is any contention that there is any such conflict between the Copyright Act and other statutory provisions.

Cir. 1950). In any event, if the central question of fair use is whether the alleged infringer's activity " 'tends to diminish or prejudice the potential sale of the plaintiff's work' " (Mem. p. 8 n. 5), the doctrine does not support the implied in law contention. Any CATV subscriber located within the Grade B contour of a television station who sees a copyrighted work that he could not adequately have received off-the-air is obviously a less likely customer of any later effort by the copyright proprietor to make that work available to him whether on television, in motion picture theaters or—a likelihood pointed to by the Solicitor General (Mem. p. 7 n. 4)—by direct licensing to CATV systems for program origination.

To be specific, as to the anti-trust laws, he says merely that "[a]nother objective to be kept in mind is minimizing the potential for monopolization of an industry" (Mem. p. 6). But this hardly amounts to an assertion that the anti-trust laws conflict with the Copyright Act as construed by the Second Circuit, or that affirmance of that decision would "operate to frustrate the purpose of the . . . federal legislation" respecting monopolies. *Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964). Plainly, the two statutes can both be given their full scope in independent proceedings, and the Solicitor General does not contend otherwise. Indeed, he does not even say that the antitrust laws are the source of the implied in law notion—merely that they are "to be kept in mind."

Moreover, the Solicitor General supports his almost casual observation that they should "be kept in mind" only with a footnote stating, without any reference to the source, that "the control of copyrights on television programming is concentrated in the three networks and seven major movie studios * * *" (p. 7, n. 4).[88] Surely more substantial factual data would have to be advanced before

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[88] It is useful in this connection to compare that assertion with the somewhat different testimony of Acting Assistant Attorney General Zimmerman before the Senate Committee—the sole "evidence" supplied by petitioner in support of its arguments respecting the antitrust laws (Br. pp. 63-64)—that "ownership and control of copyrights is highly concentrated in the networks, movie studios *and other television producers* [emphasis supplied]"—an unexceptionable but meaningless observation. Senate Hearings, note 10, p. 212. Compare also the statement of Richard W. Jencks, then Deputy General Counsel of CBS, that "during each year in the period from 1957 to 1964 first run programming for the commercial networks was supplied by 65 to 76 active program producers" and that, on a non-network basis, "'[i]n 1965 there were 148 different distributors of programs available for syndication to United States television stations." *Id.*, at p. 224. See also the testimony of Frederick W. Ford, President of the National Community Television Association, that "references to standard trade publications illustrates that there are several hundred copyright proprietors claiming rights in television programs. . . ." House Hearings, note 1, p. 1253.

as unprecedented a doctrine as the implied in law rule could be said to be required by the antitrust laws—a claim, we repeat, that the Solicitor General does not make.

Nor does he hint that the Federal Communications Act or the rules of the Commission require, or even in any fashion support, the implied in law license. His entire discussion of that Act is directed to the question whether the Grade B contour can appropriately be used as a measure of the broadcast stations' service area.

In the end, it seems that his theory is rooted in his notions of a wise copyright policy. He considers that "the economic realities of the broadcasting industry suggest the appropriateness of implying a more limited license" because, in his view, this would not significantly decrease the value of copyrighted material (Mem. pp. 9-11). But surely, apart from the merits of his views on the operations of the market, all that this comes to is a suggestion that the legislative purpose reflected in Sections 1(c) and 1(d) be ignored in situations where the courts might prefer—on grounds of "practicalities, equities, and other factors"—a different rule of liability. The power the Solicitor General asks the Court to wield is that of the Congress and not of the courts.

While the Solicitor General is silent as to the Communications Act, petitioner is not. Petitioner's version of the implied in law theory is based upon the policy of the Communications Act to promote "free public reception of licensed broadcasts" (Br. p. 80),[89] together with the policy

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[89] Understandably the Solicitor General does not seem to share this view. In *United States* v. *Southwestern Cable Co.*, No. 363, the Solicitor General suggests that without FCC regulation of CATV "the whole system of 'free' off-the-air television service might thus have been undermined. To a substantial degree, only those financially able to afford to pay monthly CATV charges and in an area where CATV could economically be provided would have been able, in the wake of the demise of local stations, to receive television service." (Br. 35).

of the Copyright Act to promote the dissemination of the author's or composer's work.

If petitioner's argument stopped there, it would be patently preposterous, for it would free the broadcast station and the network alike from the necessity of paying copyright fees. Petitioner accordingly takes care to add that these policies preclude only a "second" copyright fee for the same performance. The argument, to begin with, assumes that CATV does not "perform" the work. That assumption, as we have demonstrated, is incorrect. But in any event, there is no reason in logic why these statutory policies would make one performance free and require a license for the other. And even if it be assumed that the policy argument could be so finely tooled as to reach that result, it still proves a great deal too much to be valid. For example, the symphony orchestra or the municipal light opera group pays the copyright owner a modest license fee for the use of a copyrighted work. Is the network or the local broadcast station, then, exempt from copyright liability when it broadcasts the performance? Nor, surely, can one broadcast station escape copyright liability if it simultaneously rebroadcasts the signals of another. One may wonder, finally, if petitioner really urges that the CATV system should be free to sell for profit a program originally licensed for an educational broadcast without fee or at a nominal fee.

Even if these inherent difficulties could somehow be resolved, there are other serious problems in the communications field that would be generated by adoption of the implied in law theory. Since the basis for the doctrine is murky at best, it is wholly unclear what the applicability of the doctrine would be to modes of transmission other than CATV or to forms of communication other than television. Thus, the theory would seem to apply to CATV

retransmission of radio programs, but within unspecified and wholly undeterminable limits in view of the inapplicability of the Grade B contour criterion to radio broadcast. Background music systems like "Muzak" that furnish music by wire to their subscribers and now pay copyright proprietors for the right to do so would seem equally entitled to an implied in law license to use off-the-air musical materials.[90] Satellites, translators, and boosters—all means of extending the signal and coverage of broadcast stations—are often located within the Grade B contour of stations whose signals they retransmit, and hence would seem to be entitled to the freedom the Solicitor General recommends be given to CATV systems. So indeed would any other broadcast station whose coverage area was identical to or within the coverage area of another originating station. If such a station retransmitted the programming, having first obtained consent from the originating station under Section 325 of the Communications Act—but not from the copyright proprietor—it would surely seem that, under the implied in law theory, the retransmitting station was doing no more than reaching the same audience that the copyright proprietor had intended be reached. But from an economic standpoint it would still be true that the exposure of the author's copyrighted material on two or more stations in the same area would *in fact* reach more persons than if it had been exposed only over one, and that the interest of these additional persons in seeing the work at some other time or over some other medium or by means of a subsequent broadcast would accordingly have been diminished to the obvious detriment of the copyright proprietor.

To these practical considerations must be added a compelling point of law—petitioner's reliance upon the Com-

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[90] See *Leo Feist, Inc.* v. *Lew Tendler Tavern Inc.*, 267 F. 2d 494 (3d Cir. 1959).

munications Act is undermined by Section 325 of that statute, which prohibits "rebroadcast . . . without the express authority of the originating station.". Thus the Congress has explicitly declared that the policy of the Act in favor of dissemination of television programs does not go so far as to authorize the pirating of a station's signals. Rather, the originating station is given a right of defense quite analagous to the protection the copyright proprietor and the "invaded" station can receive under the Copyright Act.

Moreover, surely the difficulty of marking the limits of an implied in law license argue against its adoption. Since the Solicitor General himself outlines the problem (Mem. p. 14), we merely note that the predicted Grade B contours may depart widely from the actual reception conditions surrounding a station's broadcasts (*supra*, p. 15), and that it is difficult to justify a theory that departs from the factual assumptions which underlie it. On the other hand, it is also true, as the Solicitor General evidently fears, that if the implied in law license were to be gauged by the actual service areas of the stations, predictability would be at a minimum and controversy and litigation at a maximum.

Finally, we note the Solicitor General's suggestion that his proposal somehow draws strength because it "coincides, at least in rough outline, with the most likely legislative resolution of the matter of CATV copyright liability for the future." (Mem. p. 16.) Even if this observation were somehow relevant, it is not valid. It is true that Section 111 of the Kastenmeier bill (H.R. 2512, 90th Cong., 1st Sess.)—a provision that, we have noted, was *not* included in the measure the House passed—would provide in many situations copyright immunity in the "normal service area" of the originating station. However, not only is "normal service area" not coextensive with Grade B

contour, but also the bill would impose compensating obligations upon CATV systems. One of the most important of those obligations would be that the CATV systems not originate entertainment programs, since otherwise they would become, in the local service areas, competitors of the broadcast stations, and should in such circumstances not be permitted to utilize without cost the programs that are so expensive to the broadcasters. This consideration is of special importance in a place such as New York City where there is a large market concentrated within the Grade B contours of the local stations and where, accordingly, if CATV is not only free of copyright costs but also free to originate programs, it could work grave harm to the local broadcast stations.

Moreover, Section 111 addressed itself to a serious problem that the Solicitor General's proposal leaves in the air—the problem of contour overlap, which he describes but leaves with the singularly opaque observation that it "can properly be left for case-by-case resolution" (Mem. p. 15). *What* is to be decided case-by-case, and upon what standards? Are the courts supposed to delineate the actual service areas in cases of overlap? If so, are they then to be free nonetheless to permit intrusion of CATV? If so, what criteria are they to apply? Section 111 would deal with the matter by permitting broadcasters having exclusive rights in overlapping service areas to notify CATV operators that they may not retransmit the signal, and failure to honor such a notification would subject the CATV operator to full copyright liability.[91]

All of these reasons demonstrate the infirmity of the implied in law doctrine. If, as well may be, it is desirable to have a code that reconciles the conflicting interests of

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[91] H.R. 2512, 90th Cong., 1st Sess. Sec. 111(b)(6). For an explanation of this complex provision, see H.R. Rep. No. 2237, 89th Cong., 2d Sess., p. 81 (1966).

those affected by the growth of CATV, it is for the Congress and not for the courts to prescribe the detailed provisions that are necessary.

V

Private Damage, Public Policy and Prematurity

The arguments presented to this Court by petitioner are deeply rooted in pleas for public policy as a "decisive" basis for decision (Br. p. 60). In part, this aspect of petitioner's argument is pitched upon the claim that, as a practical matter, it would be too difficult for CATV systems to secure licenses. It is hard to put any stock in an assertion that the copyright proprietor's interests should be sacrificed because of the method in which the CATV systems do business. And that is all this contention amounts to, for the absence of a practical system of securing copyright licenses is due solely to the fact that the CATV systems have attempted to escape liability. As the development of copyright licensing in the broadcasting industry shows (*supra*, p. 19), workable means for securing clearances for the innumerable copyrighted works used in this complex industry have been devised. There is certainly no reason to assume that similar means will not be established with respect to CATV when it is willing to pay fair license fees.

There remains, to be sure, the question of past damages that was heavily stressed in the petition for certiorari (although not in petitioner's brief) and by The National Cable Television Association, Inc., and that is adverted to by the Solicitor General. In its most extravagant form, the claim is that the CATV industry may be mortally injured by the assessment of damages.[92] To this fear there are two answers, one historical and the other judicial.

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[92] The petition for writ of certiorari emphasized that damages for past violations threatened ruin to 1700 CATV systems (pp. 24-25), but peti-

The historical answer is amply persuasive but is not conclusive. The existence of copyright liability has not put out of business any of the many broadcast stations, or for that matter the restaurants, bars, high school dramatic clubs, and similarly positioned small users. The copyright owners, and the associations and agents through which the industry operates, want royalties from going concerns, not extinction of their customers. So far as concerns CATV itself, it has produced only two suits for damages, this and one other.[93] A number of major owners of the copyrights infringed by CATV in the fall of 1967 formally assured the Chairman of the Senate Committee that, despite the running of the three-year statute of limitations (17 U.S.C. 115(b)), they would refrain from instituting legal action while negotiations for settlement or for legislation were in progress.[94] We can for ourselves be sure that a tolerance so striking will not be converted into intransigent and self-defeating vengeance by a decision of this Court, but we cannot prove that it will not be. We turn, accordingly, to the judicial protection which can we believe be proved.

The predictions of the demise of CATV in the wake of a decision affirming the Second Circuit's judgment are based upon the assumption that the $250 "minimum" for each "infringement" provided for in Section 101(b) of the Copyright Act would be the absolute floor for damages.

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tioner's brief on the merits omits that claim. The National Cable Television Association, Inc., as *amicus curiae*, emerges from an arithmetic exercise with the conclusion of $1 million a month liability for each CATV system (p. 20 n. 36). The Solicitor General finds merit in his "implied in law" middle ground because it "would substantially lighten the burden" of past infringements, but yet is troubled that the matter would remain partially unsolved (p. 17).

[93] *Columbia Broadcasting System, Inc.* v. *TelePrompter Corp.*, 251 F. Supp. 302 (S.D. N.Y. 1965), apparently being held pending decision of this case.

[94] 113 Cong. Rec. S 14067, (daily ed. Oct. 3, 1967).

While the issue of damages has been reserved for trial and decision at this stage would in that view be premature, the suggestions that the problem of damages should bear heavily on the issue of infringement cannot be countered without some discussion of the law of copyright remedies. This is particularly the case since some commentators suggest, without any very close analysis, that the statutory minimum should govern in every case.[95] This assumption is, in our view, incorrect. We believe rather that the Act confers full discretion upon the district court to reach a result which is just in all the circumstances.

Section 101(b) on its face gives to the court a discretionary choice between "such damages as the copyright proprietor may have suffered * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just," with the statutory maximum and minimum to govern such allowance of just damages.[96] This is made especially plain when § 101(b) is compared with its predecessor, Rev. Stat. 4966, which gave the court no such discretionary choice.[97]

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[95] See, *e.g.*, Nimmer, *Copyrights* (1966) § 154.11.

[96] Section 101 of the Copyright Act provides in relevant part:

> If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> (a) Injunction.—To an injunction restraining such infringement;
>
> (b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated * * * [specific types of infringements and amounts set out], and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty * * *.

[97] Rev. Stat. 4966, as amended, 29 Stat. 481 (1897), provided:

> Any person publicly performing * * * any dramatic or musical composition for which a copyright has been obtained, without the

The earlier decisions of this Court under § 101(b) are not very clear in this regard.[98] But the most recent decision of this Court makes it plain enough that the district court has a discretionary choice between actual damages or profit and the statutory range. In *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 231, 234 (1952), the Court said:

> • • • [T]he statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.
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> We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon profits and damages or one estimated within the statutory limits is more just.

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consent of the proprietor • • • shall be liable in damages therefor, such damages *in all cases* to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just • • •. [Emphasis added.]

[98] *Westerman Co.* v. *Dispatch Co.*, 249 U.S. 100, 106-107 (1919), held that it was error to allow damages less than the statutory minimum when the amount of actual damages could not be proved:

> "Within these [statutory] limitations the court's discretion and sense of justice are controlling, but it has no discretion *when proceeding under this provision* to go outside them." (Emphasis supplied.)

Jewell-LaSalle Realty Co. v. *Buck*, 283 U.S. 202 (1931), arose upon a certified question and simply held that the statutory damage minimum was binding where there was "no proof of actual damages"; we take it that this meant no proof of the amount of the actual damages, since the decision could hardly have been so cursory had there been proof that no damages accrued. *Douglas* v. *Cunningham*, 294 U.S. 207 (1935), is no more rewarding on this issue. It held that the court of appeals could not reverse the discretion of the district judge who chose to apply the $5,000 maximum allowed by the statutory range.

The lower courts, in applying the statutory formula, have frequently expressly recognized that they were doing so in the exercise of their discretion;[99] and where the issue has arisen a number of courts have declined to award statutory damages where it is established that there were no actual damages or profits or that actual damages or profits were lower. *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236, 242 (9th Cir. 1966); *Washington Pub. Co.* v. *Pearson*, 140 F. 2d 465, 466 (D.C. Cir. 1944); *Davilla* v. *Brunswick-Balke Collender Co.*, 94 F. 2d 567, 568-70 (2d Cir. 1935) *cert. denied*, 304 U.S. 572 (1938); *Turner & Dahnken* v. *Crowley*, 252 F.2d 749, 752-754 (9th Cir., 1918); *F. A. Mills* v. *Standard Music Roll Co.*, 223 Fed. 849, 852 (D.N.J. 1915); *cf. Woodman* v. *Lydiard-Peterson Co.*, 192 Fed. 67, 71 (D. Minn. 1912), *aff'd*, 204 Fed. 921 (8th Cir. 1913). Moreover, in the related fields of trademark infringement and unfair competition the courts have frequently refused to order an accounting or to award damages when the issuance of an injunction "will satisfy the substantial equities of the case."[100]

The accounting provisions of Section 101(b) impose no greater bar to an enlightened discretion of the trial court

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[99] *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th Cir. 1950); *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (D. Cal. 1963), *aff'd*, 367 F. 2d 236 (9th Cir. 1966); *Advisers, Inc.* v. *Wiesen-Hart, Inc.*, 161 F. Supp. 831, 834 (D. Ohio 1958), *vacated on other grounds*, 238 F. 2d 706 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957); *Burndy Engineering Co.* v. *Sheldon Service Corp.*, 39 F. Supp. 274, 275 (E.D. N.Y. 1941), *aff'd* 127 F. 2d 661 (2d Cir. 1942). The most striking of these cases is *American Visuals Corp.* v. *Holland*, 261 F. 2d 652, 655 (2d Cir. 1958), where the infringer's profits exceeded $7,395 but the trial judge effected a lower damage award by applying statutory damages in lieu of profits. The Court of Appeals said, "he [the trial judge] chose to grant the lesser statutory amount as he had discretion to do. *F. W. Woolworth* • • •."

[100] *Champion Plug Co.* v. *Sanders*, 331 U.S. 125, 131-32 (1947); *Straus* v. *Notaseme Co.*, 240 U.S. 179, 181-183 (1916); *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472 (3d Cir. 1963), *cert. denied*, 374 U.S. 806; *National Van Lines* v. *Dean*, 237 F. 2d 688, 694 (9th Cir. 1956); *Square D. Company* v. *Sorenson*, 224 F. 2d 61, 65-66 (7th Cir. 1955).

than do the damage provisions. Accounting is an equitable remedy, and is designed "to prevent an unjust enrichment by allowing injured complainants to claim 'that which, *ex aeque et bono,* is theirs, and nothing beyond this.'" *Sheldon* v. *Metro-Goldwyn Corp.,* 309 U.S. 390, 399 (1940). Where there is an accounting, a defendant CATV system would not be accountable for all profits, but only for those attributable to the particular programs the copyright owner showed had been infringed. Thus, in *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.,* 367 F. 2d 236, 239, 241 (9th Cir. 1966), the court allowed plaintiff, who owned the copyright on 12 songs in a 1,000 song book, 12/1000 of the profit.

It may also be noted, if only for the sake of perspective, that even if the CATV system were fully accountable for profits for every infringing program, the resulting liability would be modest when compared to the program costs of the broadcast industry. Using the data presented to this Court by the CATV trade association [101] the profit of the typical CATV system attributable to any single program seems to be in the neighborhood of 25 cents.[102] Even in the wildly improbable case that every copyright owner sued this typical CATV system for every infringement, the result would be a recovery of about $13,000 per year.[103] This is about 22% of the annual revenue of this typical station, and

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[101] Brief for *National Cable Television Association, Inc., Amicus Curiae,* in this case.

[102] The representative CATV system is described as having 1,000 subscribers and revenues of $60,000 a year (p. 18), broadcasting 1500 programs a week of which 2/3 are copyrighted (p. 20). The gross revenue, on these data, is 77 cents per program. If profit is 57% before depreciation, interest and taxes (*supra,* p. 24) net after-tax profit might be in the neighborhood of 30%, or 23 cents per program.

[103] 25 cents x 1000 x 52.

contrasts with the 49% of all revenue paid for program procurement by the broadcast industry (*supra*, p. 21).

Finally, the copyright owner's remedy of injunction cannot, of course, be used to work unreasonable oppression of a CATV system. "[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all * * * whose interests the injunction may affect." *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157 (1939); *Yakus* v. *United States*, 321 U.S. 414, 440 (1944); *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 532 (1960). If any copyright owner should out of malice or for reasons of oppression seek to enjoin CATV retransmission, the district judge cannot be expected to lend the powers of an equity court to such an abuse of copyright.

In sum, the district court has a discretion both to choose between actual and statutory damages, whether or not to allow an accounting, and the terms of an injunction. Given that broad discretion, the question of the consequences of the Second Circuit's determination respecting "public performance" can with confidence be entrusted to the lower courts.

As we have indicated (*supra*, pp. 25-29), the types of CATV systems, in terms of their impact upon copyright proprietors, are diverse, so that the judgments in infringement suits would likely be diverse. A claim against a local CATV system that merely distributes programs within the market area of the station to which the copyright proprietor has given a license is almost certain to be treated differently than a claim against a CATV system that had imported valuable copyrighted programs into markets where a license had been given to the local station. Indeed, as to the former type of situation, which petitioner contends is present in the case at bar, petitioner insists that upon trial it will demon-

strate that there were no damages at all.[104] In other cases, such as CATV service of unserved areas, a court might find that the copyright owner had lost the royalty or license fee which should have been paid him but had lost no profitable marketing opportunity otherwise open to him.

Finally, facts relevant to the defenses of estoppel and laches, which are reserved for trial in the case at bar, may be introduced in mitigation in appropriate circumstances. Suppose, for example, as will surely be contended in many cases, that the copyright proprietor knew when he licensed his program to the broadcast station that the station was used as a source of retransmission by a CATV system and made no reservation of his rights; that he knew also that, absent any demand by the copyright owner, the CATV system could be expected to retransmit the program; and that he took no action, either specific or general, to assert his rights or to demand that the infringement cease. If such facts were proved it is difficult to believe that a judge, in the exercise of his discretion, would award a crippling judgment against the CATV system.

There is, in short, an almost infinite variety of factual circumstances that will be relevant in any future copyright damage litigation involving CATV. Since the district judges are, as we have shown, free to exercise their good sense, they may be expected to carve out a flexible and *ad hoc* "middle ground" which, being rooted in facts, will be far more desirable than the abstract implied license of

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[104] Briefly summarized, petitioner's offer of proof (Br. pp. 90-94) was that respondent had been fully compensated by the broadcast stations for petitioner's retransmissions because (1) the broadcast stations knowingly sought, and received, additional advertising revenue based upon the expanded coverage supplied by the CATV systems and (2) they were therefore willing to, and did, pay license fees to plaintiff that reflected fully the value of having the copyrighted programs transmitted to the CATV subscribers. While the Court of Appeals thought this "debatable" (J.A. 1360), the point is that it is open for trial, and that if petitioner is taken at its word there were no damages at all.

considerable complexity which the Solicitor General would have this Court create in advance of trial of the relevant issues in order to deal with facts that cannot be known before that trial.

CONCLUSION

For the reasons given in the foregoing pages, the decision below should be affirmed.

Respectfully submitted,

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SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S PETITION FOR REHEARING

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TABLE OF CONTENTS

	PAGE
RESPONDENT'S PETITION FOR REHEARING	1-45
I—The holding here that CATV is nothing more than "a well-located antenna with an efficient connection to the viewer's television set" is in direct confliict with *Southwestern,* Nos. 363 and 428, *Oct. T. 1967, and both cannot stand* ..	2
II—The conflict between the decision here and that in *Southwestern* raises a grave question as to the constitutionality of governmental action which would limit reception anywhere via CATV of any television broadcast	6
III—The holding that CATV does not "perform" imperils the whole fabric of copyright protection	8
IV—Notwithstanding the differences in their ways of doing business and the means each employs to accomplish its purpose, the essential function of both broadcasting stations and CATV is to make television programs available to the public	14
V—The holding that CATV does not "perform" within the meaning of the Copyright Act frustrates the purpose of such Act and defeats the social ends it was intended to achieve	20
VI—Certainly, in bringing television programs of "distant" stations into areas for which they were not intended and cannot be viewed or heard, CATV is not a mere aid to viewing. In *Fortnightly,* half the broadcasting stations,	

PAGE

whose programs were carried by petitioner's systems, were distant stations 24

VII—The holding that CATV does not "perform" is fraught with adverse consequences for broadcasters and the public 26

VIII—The fear here expressed that CATV copyright liability under the decision of the Court below would result in liability for suppliers of television receiving sets, and the owners of apartment house master antennas, is wholly unfounded 31

IX—The legislative history of the Copyright Law Revision Bill lends no support to the holding in this case and emphasizes the need for rehearing 34

X—Granting the petition for rehearing and affirmance of the decision below would preserve the existing business relationships which the reversal has jeopardized 38

XI—Summary of Highlights 42

CITATIONS

CASES: PAGE

Associated Music Publishers v. *Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944) 21

Beban v. *Decca ReRcords, Inc.* 169 R. Supp. 829 (S.D.Cal. 1959) .....fn. 29, 38

Bobbs-Merrill Co. v. *Straus*, 210 U.S. 339 (1908)

Buck v. *Cecere*, 45 F. Supp. 441 (W.D. N.Y. 1942) .....fn. 29, 38

Buck v. *Gibbs*, 34 Fed. Supp. 510 (N.D.Fla. 1940), modified on other grounds, *sub nom.*, *Watson* v. *Buck*, 313 U.S. 387 .....fn.29, 338

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) .....12, 13, 38, 39, fn. 29, 38

Buck v. *Newsreel, Inc.*, 25 F. Supp. 787 (D.C. Mass. 1938) .....fn. 29, 38

Cable Vision, Inc. v. *KUTV Inc.*, 211 F. Supp. 47, rev'd on other grounds, 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 16

Carter Mountain Transmission Corp. v. *F.C.C.*, 32 F.C.C. 459, aff'd 321 F.2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951 (1963) fn.14, 27

Chappell & Co. v. *Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3rd Cir. 1964) ....fn. 4, 11

Davilla v. *Brunswick-Balke-Collender Co. of New York*, 94 F. 2d 567 (2d Cir. 1938) .....fn. 34, 41

Davis v. *E. I. DuPont de Nemours & Company*, 249 F. Supp. 329 (S.D. N.Y. 1966) .....fn. 34, 41

PAGE

Famous Music Corp. v. *Melz*, 28 F. Supp. 767 (W.D. La. 1939) ..... fn. 29, 38

F. W. Woolworth Co. v. *Contemporary Arts*, 344 U.S. 228 (1952) 41

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 7, 23

Harms, Inc. v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd *sub. nom., Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3rd Cir. 1959) .... fn. 4, 11, 19, fn. 29, 38

Herbert v. *Shanley Company*, 242 U.S. 591 (1917) 10, 16

Intermountain Broadcasting & Television Corp. v. *Idaho Microwave, Inc.*, 196 F. Supp. 315 (S.D. Idaho 1961) 15, 16

Jerome H. Remick & Co. v. *American Auto Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925) .... fn. 21, 32

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 14

Lilly v. *United States*, 238 F. 2d 584 (4th Cir. 1956) ..... fn. 9, 18

Marsh v. *Alabama*, 326 U.S. 501 (1946) 7

Martin v. *Struthers*, 319 U.S. 141 (1943) 7

Mazer v. *Stein*, 347 U.S. 201 (1954) 21

Metro-Goldwyn-Mayer D. Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932), same case on remand, 3 F. Supp. 66 (D.C. Mass. 1933) .. fn. 29, 38

Midwest Television, Inc. v. *Mission Cable TV, Inc.*, Docket No. 16786, June 26, 1968, 13 Pike and Fischer R.R. 2d 698 (1968) ..... fn. 2, 7, fn. 13, 26

PAGE

M. Witmark & Sons v. *Jensen*, 80 F. Supp. 843 (D.C. Minn. 1948) ..... fn. 29, 38

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 7

Remick Music Corp. v. *Interstate Hotel Corporation of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944), aff'd 157 F2d 744 (8th Cir. 1946), cert. denied, 329 U.S. 809 ..... fn. 4, 11

Select Theatres Corp. v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D. N.Y. 1943) ..... fn. 29, 38

Shapiro, Bernstein & Co. v. *4636 S. Vermont Ave., Inc.*,, 367 F.2d 236 (9th Cir. 1966), modifying in other respects, *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (S.D. Cal. 1963), and 243 F. Sup. 999 (S.D. Cal. 1965) ..... fn. 34, 41

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2 Cir. 1936) ..... fn. 29, 38

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) ..... fn. 34, 41

Society of European Stage Authors & Composers v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) ..... 12, fn. 29, 38

Tiffany Productions, Inc. v. *Dewing*, 50 F.2d 911 (D.C. Md. 1931) ..... fn. 29, 38

United States v. *Southwestern Cable Co.*, Nos. 363 and 428, Oct. T. 1967, U.S. , June 10, 1968, 36 USLW 4553 ..... 2, 3, fn. 1, 4, 5, 6, 7, 22, 23, 24, fn. 12, 25, 26, 28, 42, fn. 38, 44

PAGE

Washingtonian Pub. Co., Inc. v. *Pearson*, 140 F.2d 465 (D.C. Cir. 1944) ..... fn. 34, 41

Weaver v. *Jordan*, 64 Cal. 2d 235, 411 P.2d 289 (1966) 7, 23

Woodman v. *Lydiard-Peterson Co.*, 192 F. 67 (D. Minn. 1912) ..... fn. 34, 41

CONSTITUTION, STATUTES, AND RULES:

U.S. Constitution, Art. I, § 8, cl. 8 21

U.S. Constitution, Amend. I 7

Copyright Act, 17 U.S.C. §§ 1(c), 1(d), 101(b) .. 8, 9, 15, 20, 21, 39, 41

FCC Rules and Regulations § 74.731(a) ..... fn. 7, 17, fn. 30, 39

FEDERAL COMMUNICATIONS COMMISSION REPORTS AND ORDERS:

First Report and Order,* 38 FCC 683 (1965) fn. 6, 16, 17, fn. 14, 27, fn. 16, 29, fn. 17, 29, fn. 18, 29, fn. 19, 30

Second Report and Order,** 2 FCC 2d 725 (1966) ..... fn. 14, 27, fn. 15, 28, fn. 16, 29, fn. 17, 29, fn. 18, 29, fn. 19, 30, 33

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* So cited herein. The lengthy title is followed by the description, "First Report and Order". It is indexed in 38 FCC as "Rules re Microwave Served CATV".

** So cited herein. The official title is followed by the description, "Second Report and Order". It is indexed in 2 FCC as "CATV".

PAGE

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Bills:

H.R. 2512, 90th Cong., 1st Sess., §§ 101, 106, 111 ..... fn. 23, 34, 36

Hearings:

Copyright Law Revision—CATV, Hearings on S. 1006, Before the Subcom. on Patents, Trademarks and Copyrights, of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., pp. 13, 14, 78, 205-207, 237 (1966) .. fn. 11, 23, fn. 20, 30, fn. 32, 40, fn. 33, 41, fn. 39, 44

Hearings on S. 1739, S. 1741, S. 1801, S. 1886, and S. 2303, Before the Subcom. on Communications, of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess., pp. 579-603 (1959) ..... fn. 9, 18

Record:

Copyright Law Revision, 113 Cong. Rec. H. 3857, 3880, April 11, 1967, remarks of Congressman Celler ..... 35, fn. 24, 35

Ibid., remarks of Congressman Staggers, Chairman of the Committee on Interstate and Foreign Commerce ..... fn. 25, 35

Copyright Law Revision, 113 Cong. Rec. H. 3880, 3883, April 11, 1967, amendment introduced by Congressman Moore ..... fn. 26, 35

113 Cong. Rec. H. 3858, April 11, 1967 ..... fn. 23, 34

113 Cong. Rec. H. 4468, April 20, 1967 ..... fn. 23, 34

PAGE

Reports:

House Comm. Rep. No. 2222, 60th Cong., 2d Sess. (1909) ..... fn. 10, 20

MISCELLANEOUS:

Bulletin of National Community Television Association, July 18, 1966 ..... fn. 32, 40

Cardozo, *The Growth of the Law* (Yale University Press, 1924) 39

CATV Weekly of July 1 and 22, 1968, p. 40 ..... fn. 35, 43, fn. 36, 44

Lee, FCC Commissioner, remarks before the Midwest Conference on Intergovernmental Communications on June 20, 1968 ..... fn. 35, 43

Meeting held under the auspices of the Senate Subcommittee on Patents, Trademarks and Copyrights, April 18, 1968 36

Nimmer on Copyright (1968) §§ 107.2, 107.21 ..11, fn. 4, 11, 19

Pound, *Interpretations of Legal History* (Macmillan, 1923) 39

Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) ..... fn. 14, 27

PAGE

Television Factbook, Services Volume, 1968-69 Ed. No. 38 ..... fn. 36, 44

The New York Times, June 24, 1968, p. 36 ..... 37, fn. 36, 44

TV Communications—The Professional Journal of Cable Television, July, 1968, at p. 10 ... fn. 3, 8

Wall Street Journal, July 15, 1968, p. 3 ..... fn. 37, 44

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court respondent petitions for rehearing of the decision herein dated June 17, 1968, not only because of its impact on copyright in reversing legal principles pronounced by this Court for half a century and uniformly accepted as expressing the essential purpose of the Copyright Act, but also because of the dire and unintended consequences of the decision on creative and performing artists in all fields and the industries dependent on them.

I

The holding here that CATV is nothing more than "a well-located antenna with an efficient connection to the viewer's television set" is in direct conflict with *Southwestern*, Nos. 363 and 428, *Oct. T. 1967, and both cannot stand.*

The Court must necessarily have overlooked the inherent inconsistency and incompatibility between its decision in this case and its decision a week earlier, in *United States* v. *Southwestern Cable Co.*, Nos. 363 and 428, Oct. T. 1967, — U.S. —, 36 USLW 4553, June 10, 1968. Thus, in *Southwestern*, this Court held that CATV systems were engaged in "the simultaneous retransmission of communications" consisting of "the intercepted signals" of television broadcasting stations, and were subject to regulation by the Federal Communications Commission under the Communications Act as being engaged in " 'the transmission of * * * signals, pictures and sounds' * * * by radio or cable" in interstate communication within the meaning of the Act. Slip Op. 10, 11, 36 USLW at 4556, 4557. In reaching this conclusion, the Court described what CATV systems do in the following terms, Slip Op. 3, 36 USLW at 4554:

> CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers.

Yet, in this case, the Court held that a CATV system was a mere adjunct to its subscribers' television sets which,

> no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. Slip Op. 8, 36 USLW 4658.

And although the Court here recognized, Slip Op. 8, 9, 36 USLW 4658, that CATV "plays an 'active' role in making reception possible in a given area", the Court equated such role to that of "ordinary television sets and antennas". But while, in a manner of speaking, CATV is, as the Court said here, an "antenna with an efficient connection to the viewer's television set", in *Southwestern*, Slip Op. 3, 10, 11, 36 USLW 4554, 4556, 4587, the Court recognized that such "connection" consists of devices which take the television signals received by the antenna and "amplify them, transmit them by cable or microwave, and ultimately distribute them by wire" to the television sets of a whole multitude of viewers, thus effecting to a vast audience "the simultaneous retransmission of communications" consisting of "the intercepted signals" of television broadcasting stations. Accordingly, what the Court speaks of here as a "mere efficient connection" appears in *Southwestern* as being a complete communications system which amplifies, transmits, or retransmits, and then distributes the signals of television broadcasting stations received or intercepted by the antenna to which *it* is connected.

If, however, CATV's amplification, transmission and distribution, in sum its operation as a complete communications system which engages in the simultaneous retransmissions of intercepted signals of television broadcasting stations, *i.e.*, its " 'active' role in making reception possible in a given area", are a function only of "viewing", as the Court here holds, then *Southwestern* presents a striking anomaly. For, there, in reaching its decision, the Court emphasized the finding of the Federal Communications Commission that the "unregulated explosive growth" of CATV "placed in jeopardy" the Commission's effectuation of its statutory "obligation of providing a widely dispersed * * * television service" with a "fair, efficient, and equitable distribution" of service among the "several States and communities", and the efficacy of its exercise of the

"authority" to allocate broadcasting zones or areas, "granted to it in furtherance of, these and other purposes", because of the "adverse impact" on broadcasting stations, existing and prospective, of CATV's "substantial competition" and its "dividing the available audiences and revenues". *Southwestern*, Slip Op. 7-9, 16-18, 36 USLW 4555-4556, 4558-4559.[1] Patently, it is an anomaly that what this Court here holds to be merely a function of "viewing" can be considered as having an "adverse impact" on television broadcasting, as a result of its "substantial competition" and its "dividing the available audiences and revenues", and as frustrating the FCC's allocation of broadcasting zones or areas. *Fortnightly* thus poses the strange and unaccustomed concept that consumers

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[1] Significantly, this Court observed in *Southwestern*, Slip Op. 17, fn. 43, 36 USLW 4558, 4559:

> It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting. * * * The Committee concluded that CATV *competition* does have an effect on orderly development of television. [Emphasis supplied]

Again, in *Southwestern*, Slip Op. 18, 36 USLW 4559, this Court noted:

> * * * [T]he Commission feared that CATV might, by *dividing the available audiences and revenues*, significantly magnify characteristically serious financial difficulties of UHF and educational television broadcasts. [Emphasis supplied]

And again, in *Southwestern*, Slip Op. 18, fn. 44, 36 USLW 4559, this Court said:

> The Commission * * * concluded that 'one general factor giving cause for serious concern' * * * was that there is likely to be a 'severe' impact between new local stations * * * and CATV systems. * * * Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such *competition*. * * * [Emphasis supplied]

(here, viewers) of a product (here, television programs) by their consumption of it (here, viewing) compete with and adversely affect its producers (here, television broadcasters) and their marketing procedures (here, FCC broadcasting zones or areas).

The incompatibility of the Court's decisions here and in *Southwestern* is fundamental and reaches the very "function that CATV plays in the total process of television broadcasting and reception", on which the Court here says, "resolution" of the copyright "issue * * * depends", Slip Op. 6, 7, 360 USLW 4657, 4658. On this basis, *Southwestern* and *Fortnightly* cannot stand together because "the function that CATV plays in the total process of television broadcasting and reception" cannot, in the nature of things, at one and the same time be both that of a "communications system", *Southwestern*, Slip Op. 6, 36 USLW 455, in "competition" with broadcasting, and "dividing the available audiences and revenues", as *Southwestern* holds, Slip Op. 17, 36 USLW 4558 and that of nothing more than a "well-located antenna with an efficient connection to the viewer's television set", serving a "function * * * little different from that served by the equipment generally furnished by a television viewer". Slip Op. 8, 9, 36 USLW 4658.

II

The conflict between the decision here and that in *Southwestern* raises a grave question as to the constitutionality of governmental action which would limit reception anywhere via CATV of any television broadcast.

While *Southwestern* upholds, Slip Op. 20, 36 USLW 4559, the FCC's limited "authority to regulate CATV" in ways "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting", the Court expressly refrained from considering "the validity of the specific rules promulgated by the Commission for the regulation of CATV." Slip Op. 9, 36 USLW 4556. Accordingly, such questions are reserved for future consideration. Nevertheless, in *Southwestern*, Slip Op. 8, 15-19, 36 USLW 4556, 4558-4559, the Court noted the Commission's distant signals rule forbidding, with certain exceptions, "the importation by CATV of distant signals into the 100 largest television markets" and the compelling reasons which led the Commission to adopt it. If, however, as the Court here holds, CATV is no more than "a well-located antenna with an efficient connection to the viewer's television set", which "falls on the viewer's side of the line," and whose "'active' role in making reception possible in a given area" is only that of the "ordinary television sets and antennas", Slip Op. 8, 36 USLW 4658, then, the question is posed whether the Commission's "distant signals" rule, the keystone of its regulation of CATV, is not tantamount to prohibiting viewers from hearing and viewing such programs as they can receive through the use of a "well-located antenna with an efficient connection", such as might be "erected and owned" by viewers themselves. Slip Op.

9, 36 USLW 4658. Considered in this light, the Commission's rule prohibiting the importation of distant signals into the top 100 markets poses a grave constitutional question, for the use of a mere "well-located antenna with an efficient connection" does not involve the use of any of the limited available spectrum space, and, accordingly, the basis for the curtailment of First Amendment rights sanctioned in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, is not present. In this posture, the question remains whether the denial of rights guaranteed by the First Amendment is constitutionally permissible as an exercise of the FCC's "authority to regulate CATV," as a measure "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Southwestern,* Slip Op. 20, 36 USLW 4559. *Cf. Griswold* v. *Connecticut,* 381 U.S. 479, 482; *Weaver* v. *Jordan,* 64 Cal. 2d 235, 411 P.2d 289 (1966). See also, *Martin* v. *Struthers,* 319 U.S. 141, 143; *Marsh* v. *Alabama,* 326 U.S. 501, 505-508. Otherwise put, the question would be whether, in the exercise of such authority, the Commission might constitutionally prohibit viewers from using reception devices enabling them to receive broadcasts from London, Paris, Moscow or Peking, for example—or, perhaps, from Pittsburgh or Los Angeles.[2]

If the keystone of the FCC's pattern of CATV regulation —its "distant signals" rule—should fail for want of constitutional validity, then, in the absence of copyright protection for their programs, broadcasting stations would, as the Commission has foreseen, succumb to the "unequal" competition of CATV, and the national communications policy in regard to television would be utterly frustrated.

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[2] In *Midwest Television, Inc.* v. *Mission Cable TV, Inc.,* Docket No. 16786 (June 26, 1968), 13 Pike and Fischer R.R.2d 698 (1968), the FCC prohibited "further carriage of Los Angeles signals by CATV systems in the San Diego area." A petition to review has been filed by Mission Cable TV, Inc. in the United States Court of Appeals for the Ninth Circuit.

Southwestern, Slip Op. 4-9, 15-19, 36 USLW 4554-4556, 4558-4559.[3]

We do not believe that the constitutional argument is valid, but only because CATV is a communications system engaged in the transmission of programs. If, however, *Fortnightly* stands, then as a practical matter, and in addition to the devastating consequences discussed below, the power of the FCC to deal with the problems created by CATV and to protect broadcasting against the unfair advantages of CATV may be severely curtailed, if not emasculated.

III

The holding that CATV does not "perform" imperils the whole fabric of copyright protection.

In holding that CATV does not "perform", the Court necessarily overlooked the crucial difference between viewing—or a "private performance"—on the one hand, and a "public performance", on the other, and that, under §§ 1(c) and 1(d) of the Copyright Act, copyright liability attaches only to "public performances".

In concluding that in doing what it does, CATV does not "perform", the Court reasoned, pp. 8, 9:

> "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broad-

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[3] Such an attack on the FCC's present scheme for regulating CATV is reported as already being planned by CATV. See *TV Communications—The Professional Journal of Cable Television*, July, 1968, at p. 10, where it is said:

> *Litigation of certain FCC regulations*, particularly the "top 100" market restrictions, is a certainty in view of Supreme Court decision upholding Commission authority over cable television. Legal challenge will focus on alleged violations of the First and Fifth Amendments to the Constitution.

caster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. *The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.*" (Emphasis supplied)

In so reasoning, the Court clearly overlooked the compelling significance of the "only difference", which it thus dismissed out of hand.

In turning on his television set and watching the show, a "viewer" does not in any real sense "perform" the copyrighted work being broadcast, or at most, he "performs" it privately. Certainly, too, no performance, or at most, a private performance, is involved if the "viewer" is joined, socially, by friends and members of his family. Nor is the result any different if a television set is cooperatively owned, and the cooperators view the broadcast together, even if they are joined, socially, by their friends and members of their families. Yet what is thus no performance, or at most, a private performance, must indisputably at once become a public performance or a performance in public, within the meaning of Sections 1(c) and 1(d) of the Copyright Act, when the "viewer" invites and permits the public to watch the broadcast. Obviously, "the only difference" is the "viewer's" invitation and permission to the public to watch the broadcast. And, as this Court has held, if the invitation and permission to the public has a commercial purpose, what might have been

no performance, or at most a private performance, becomes not only a public performance, but a public performance for profit. *Herbert* v. *Shanley Company*, 242 U.S. 591.

A CATV system, indeed, includes a gigantic antenna which receives the signals broadcast by television stations, and to that extent and in that sense "falls on the viewer's side of the line", as the Court, p. 8, has put it. But CATV does not stop there. Simultaneously with receiving a broadcasting station's signals, it amplifies them and restransmits them to members of the public commercially, and for profit. Thus, like the passive "viewer" who invites the public to see the broadcast at a price, CATV transforms itself from a passive "viewer" to an active "performer" for profit when it retransmits the broadcast of the copyrighted work to the public commercially. The "only difference" between neighbors getting together and erecting a hilltop antenna for their own use and a CATV system (which is *not* a simple hill top antenna, as the record makes abundantly plain) is just that which distinguishes the "viewer" who watches a broadcast, socially, with his family and friends, and the "viewer" who commercially invites and permits the public to watch the broadcast.

In absolving CATV from copyright liability on the ground that CATV merely did for "viewers" what each viewer could do for himself without copyright liability—that an "enterpreneur" can do for the public what each member of the public could do for himself—the Court clearly overlooked the novelty of its holding, its utter incompatibility with hitherto well-settled and unquestioned principles in the field of copyright, and the devastating effect it must have on copyright protection.

Thus, it has been considered fundamental that no copyright liability attaches when a copyrighted story, poem or other writing is read out loud in privacy by the reader, or even in the presence and for the edification or entertainment of one or more auditors, at a gathering to which the

public is neither invited nor admitted. Nimmer on Copyright (1968) §§ 107.2, 107.21. Similarly, no copyright liability attaches when one plays a copyrighted musical composition under similar circumstances. Nimmer on Copyright (1968) §§ 107.2, 107.21. These are things that one can do for oneself without incurring copyright liability. On the other hand, when an *entrepreneur* undertakes commercially to read a copyrighted writing aloud, or to play a copyrighted musical composition, for the enjoyment of the public, copyright liability has always, and uniformly, been considered as attaching, even though every member of the public in attendance was himself free, without incurring copyright liability, to read the copyrighted writing aloud, or to play the copyrighted composition, for himself or for any gathering not comprising the public. The same consequences have followed in the case of recordings. Thus, anyone has been considered at liberty, without incurring copyright liability, to play for his own enjoyment and that of others not constituting the public, a phonograph record of the rendition of a copyrighted work. Nevertheless, an entrepreneur playing the same record commercially for the public's enjoyment has never been considered to be free of copyright liability merely because each member of his audience could have played the record for himself, and his family and friends, without such liability.[4]

It will be observed, moreover, that copyright liability *vel non* does not hinge on the similarity or dissimilarity, or the identity or otherwise of the means used in making the copyrighted work audible or visible, or both, as the case may be. Thus, whether the human voice, a piano, or other

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[4] *Remick Music Corp.* v. *Interstate Hotel Corporation of Nebraska*, 58 F. Supp. 513, aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809; *Harms* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd sub nom. *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3rd Cir. 1959); *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3rd Cir. 1964). Nimmer on Copyright (1968), § 107.21.

musical instrument, a phonograph and phonograph record, or the most advanced and complex of electronic equipment is the instrumentality employed, is wholly immaterial. What is determinative, however, is for whom it is employed, i.e., for the public or not. In sum, the identical "sounds" and "pictures", whether made in the identical manner and by means of identical instrumentalities, or not, will result in copyright liability, or not, depending upon whether they are made "publicly" or "in public", or not.

The foregoing reflects basic principles underlying copyright with which the Court's decision here is wholly incompatible. If the startling principle applied here is equally applicable in the example given above—and the Court suggests no reason why it should not be—little is left of the fabric of copyright protection. Nothing in the Copyright Act, and nothing in any of the myriad of copyright cases decided by the courts since the enactment of the first copyright act in 1790, as much as suggests the existence of any such principle as the Court has applied here.

In rejecting the holding of the Court of Appeals that CATV "performs", this Court denied the force of precedent to its decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, saying, Slip Op. 6, 36 USLW 4657, fn. 18:

> The court [of Appeals] formulated and applied this test in the light of this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191. See also *Society of European Stage Authors & Composers Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937). But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n.5.

In thus disposing of *Jewell-LaSalle*, the Court clearly overlooked that the *single* reason given by Mr. Justice Brandeis as to why "the result might have differed if * * * the original broadcast had been authorized by the copyright holder" (Slip op. 6 fn. 18, 36 USLW 4657) was *not* that in such circumstance the hotel company would not have "performed", but, expressly, that 283 U.S. at 199, n. 5:

> If the copyrighted composition had been broadcast * * * with plaintiffs' consent, *a license for its commercial reception and distribution by the hotel company might possibly have been implied.* [Emphasis supplied.]

This comment of Mr. Justice Brandeis is thus wholly irrelevant to the holding in *Jewell-LaSalle* that the hotel company "performed" the copyrighted composition, and it does not detract one whit from the force of that holding, that the case *might* have gone against the copyright owner on the theory of an implied license, if the original broadcast had, as in this case, been expressly licensed. Indeed, by suggesting the possibility that the hotel company's "commercial reception and distribution" *might* have been impliedly licensed if the original broadcast had been licensed, this Court made it plain that whether the original broadcast was licensed or not, in doing what it did, the hotel company "performed" the copyrighted composition.[5]

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[5] Here the issue whether CATV's commercial reception and distribution "was impliedly licensed by the licensing of the original broadcast", was reserved for future trial and determination by the District Court, and was not before the Court of Appeals or this Court (A25, 165-168, 174).

IV

Notwithstanding the differences in their ways of doing business and the means each employs to accomplish its purpose, the essential function of both broadcasting stations and CATV is to make television programs available to the public.

In enumerating the differences between CATV systems and broadcasting stations, Slip. Op. 9, 10, 36 USLW 4658, 4659, the Court fails to note that such differences pertain only to their methods of doing business and their means of achieving the end result and overlooks the complete identity of their essential function, which is to make television signals available for reception by viewers' television sets for reconversion "into the visible images and audible sounds of the program". Slip. Op. 7, 36 USLW 4657.

In fulfilling this function it is immaterial that broadcasters arrange programs, while CATV takes them as it finds them; that broadcasters make programs available to the public without discrimination, while CATV serves all members of the public who are willing to pay to receive the programs; or that broadcasters distribute programs through the air, while CATV distributes them by cable. For, as Mr. Justice Holmes said for this Court in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 61, 62, where in 1911 the exclusive right of authors under the 1891 Copyright Act "to dramatize their works" was held applicable to motion pictures,

> [t]he essence of the matter * * * is not in the mechanism employed, but that we see the event or the story lived.

In either manner, and by either method, what is intended, and what is accomplished, is that viewers "see the event or the story lived". And it is, clearly, the single

function of both broadcasters and CATV to bring that about.

The complete identity of the essential function of a broadcasting station and that of a CATV system is readily perceivable. Thus, consider any two neighboring houses at the same time any given evening, with the families living in each sitting around their respective television sets, watching the programs of their choice. The scene in both homes is the same, but one family is watching a broadcast by a "local" television station and received "off the air", and the other is watching a broadcast by a "distant", out-of-range television station, received, amplified, retransmitted and distributed by cable by CATV. Thus, in each case, the broadcaster and the CATV system serve and perform one and the same function—to make television programs available to those having receiving sets who may wish to see them. That they achieve this result by different means must, for copyright purposes, be immaterial, for Sections 1(c) and 1(d) of the Copyright Act explicitly provide that they apply to performances made "in any manner or by any method whatsoever".

The Court's citation, Slip Op. 9, fn. 28, 36 USLW 4658 of *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315 (S.D. Idaho, 1961) is inapposite. For, there, the action alleged was for unfair competition, brought by a "distant" television station against a CATV system which distributed its signals to members of the public located in an area beyond the distant station's range. While the differentiating factors to which the Court there points may have relevance in determining whether the broadcaster and the CATV system involved were competitors, this Court clearly overlooked their utter irrelevance in determining whether either, or both of them, "performed" the copyrighted works contained in the broadcasts each of them brought to thousands of homes. Whether in doing what it does CATV "performs" the

copyrighted works in the broadcasts it distributes cannot depend on whether it receives its remuneration from advertisers or viewers, or on whether it has anything "to do with * * * program content or arrangement". *Herbert* v. *Shanley Company*, 242 U.S. 591. The single point of *Intermountain* was that, by reason of the differences in the manner in which and the places where they conducted their businesses, a CATV system was not in competition with, and, accordingly, could not unfairly compete with a "distant" television station whose broadcasts it distributed in an area beyond the station's range. That this is all that *Intermountain* teaches is emphasized by the same Court's *later* decision that a CATV system did unfairly compete "for television viewers" with the "local" broadcasting station serving the area into which the CATV system imported a distant broadcasting station's signals. *Cable Vision, Inc.* v. *KUTV Inc.*, 211 F. Supp. 47, rev'd on other grounds, 335 F. 2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989.[6]

It should be observed, moreover, that the selection of programs is by no means an inherent characteristic of broadcasting. Television broadcasting systems such as UHF translators, which receive the signals of VHF televi-

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[6] Cf. *First Report and Order*, 38 F.C.C. 683, 701, 702 (1965), where the Federal Communications Commission said:

> It is often asserted that CATV systems do not, in fact, compete with broadcasting stations, since they do not compete for the advertising dollar on which commercial broadcasting lives. While superficially appealing, we cannot accept this view * * *.
>
> In large part * * * the CATV industry brings to areas already served by one or more stations the signals of other stations which are well beyond the normal range of reception.
>
> * * * When a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

sion stations, translate them into UHF frequencies and then rebroadcast them, and VHF repeater stations and satellite stations, which receive signals of broadcasting stations and then amplify and rebroadcast them in areas not reached by the station originating the signals, A 56, E 283-286, do not make any selection of programs, but merely retransmit whatever programs are broadcast by the originating stations whose signals they translate or amplify, and then rebroadcast.[7] Neither operators of translators, of which there are approximately 2,000 in the United States, nor the operators of satellites or repeaters claim the right to rebroadcast copyrighted programs without authority of the copyright owner. Cf. *First Report and Order*, 38 F.C.C. at 704, 705.[8]

The similarity between CATV systems and repeaters, translators and satellites reaches beyond the mere absence of selection of programs. None of such facilities—as none of the CATV system here involved—either originates, procures or selects its programs; each, including CATV, uses substantially the same type of equipment to receive and process signals for retransmission, A 1088-1148, 1216-1227, each retransmits the programs it receives, and processes, to members of the public in areas where viewers could not receive them with ordinary equipment, and each thus finds its function, in the total process of television

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[7] 47 C.F.R. § 74.731(a) reads as follows:

> Television broadcast translator stations provide a means whereby the signals of television broadcast stations may be retransmitted to areas in which direct reception of such television broadcast stations is unsatisfactory due to distant or intervening terrain barriers.

[8] If *Fortnightly* stands, copyright proprietors will lose revenue from translator and satellite stations who, although currently paying royalties, will hereafter refuse to do so, asserting that by application of the same functional test applied in *Fortnightly*, they, who also merely relay programs, do not "perform" and are therefore free from copyright liability.

broadcasting and reception, as a device to bring television programs into areas in which they would not otherwise be received, or received satisfactorily.[9]

Furthermore, in this context, it must be recognized as a distinction without a difference that broadcasters "propagate" their programs "to the public" while CATV systems "carry them by private channels to additional viewers", Slip Op. 10, 36 USLW 4658. The record is clear that such "additional viewers" are any members of the public located in the area served by the CATV system

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[9] The District Court so found, A 57, on the testimony of *Fortnightly's* principal expert witness, Mr. A. Earl Cullum, before a Senate subcommittee (Hearings on S 1739, S. 1741, S 1801, S 1886, and S 2303 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86 Cong., 1st Sess., 579-603 (1959), set out at E277-293). Mr. Cullum testified that all such systems (translators, repeaters and CATV) are "similar in their reliance on broadcast signals and in the extent to which they will go to receive signals from television broadcast stations", and that the "systems differ only in the method of distribution of the signals after they have been received". Cf. A 1088-1148, 1216-1227, E283.

In *Lilly* v. *United States*, 238 F. 2d 584 (4th Cir. 1956), cited by the Court, Slip Op. 8, fn. 26, 36 USLW 4658, for the proposition that CATV is "a mere adjunct of the television receiving sets with which it was connected * * *", the Court held that the fees payable by subscribers to CATV operators were not subject to an excise tax levied upon "wire and equipment service". In so holding, the Court observed, 238 F. 2d 588, that "Congress has never taxed television transmission or reception. It is admitted that a booster station maintained by a transmitting station would not be subject to the tax; and we see no reason why owners of receiving sets should be taxed upon amounts paid for equipment analogous to a booster station to make their sets workable". This case then holds, in substance, that CATV, like television transmission and reception, was not subject to the tax in question and in so doing analogies CATV to booster (i.e., repeater) stations. It is, accordingly, hardly authority for the proposition that CATV bears any different relationship to reception than does broadcasting by either originating or repeater stations.

who are willing to pay CATV's price. Thus, both broadcasters and CATV supply the public with television programs, and it has never heretofore been considered by this or any other Court that the production of a copyrighted work, for example, in a public square for the free enjoyment of all those who were there to see it, and which is paid for otherwise than by the audience, was a "performance", while a production open to the public, but only on the payment of an admission price, was not. Nor have the numbers of those in the audience ever been considered material. Rather, the criterion has been whether viewing the production is open to all upon the payment of such charge, *if any*, as may be levied. Nimmer, on Copyright (1968) § 107.21.

The concept that a CATV system retransmits and distributes "programs that have been released to the public", Slip Op. 10, 36 USLW 4658, is patently an erroneous one. The programs that CATV distributes have, indeed, been performed in public by broadcasters, but they have not thereby been "released" or "dedicated" to the public. A broadcast is like a production in a public square for all to see who wish to do so—a public performance, of course, but not a "release" or an abandonment of the copyright, or a relinquishment of the work to the public, for any and all publicly to perform without license.

Nor is it material in this connection that broadcasters "disseminate" the programs to the public through the airwaves, while CATV systems "transmit" or "carry" them to the segment of the public they serve by cable. Slip Op. 1, 2, 7, fn. 20, 36 USLW 4656-4658. Thus, it is recognized that the transmission to members of the public by telephone wires of sounds produced by playing phonograph records constitutes a public performance. *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd sub nom. *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

V

The holding that CATV does not "perform" within the meaning of the Copyright Act frustrates the purpose of such Act and defeats the social ends it was intended to achieve.

In narrowly construing the words "to perform", as used in Sections 1(c) and 1(d) of the Copyright Act, so as to exclude CATV retransmissions of television broadcasts for simultaneous viewing by members of the public, the Court overlooked the essential purpose of copyright and the social ends it was intended to achieve.

The Court refers, Slip Op. 5, text and fn. 15, 36 USLW 4657, to the legislative history of the Copyright Act to note only that the attention of the Congress was directed to the problem arising when the dialogue of a play is transcribed without authority by a member of the audience, and the play is thereafter produced with the aid of the transcript. Yet, it would seem clear that, if that were the only problem which the Congress sought to deal with, it would have stopped with the enactment of that part of Section 1(d), which grants the author the exclusive right "to make or to procure the making of any transcription or record" of the dramatic work from which it may be performed. But the Congress did *not* stop there. One the contrary, at the instance of President Theodore Roosevelt, it enacted Section 1(d) couched in the broadest language imaginable as legislation intended to protect the copyright proprietor against the whole range of modern reproductive processes.[10]

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[10] House Committee Report No. 2222, 60th Cong., 2d Sess. (1909), in recommending the adoption of what became the Copyright Act of 1909, quoted the following from a message of President Theodore Roosevelt to the Congress in December 1905:

It is clear that the guiding principle must be found in the purpose of copyright and in the ends it is intended to serve. *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346. Copyright has its origin in the power granted to the Congress in Article I, Section 8, Clause 8, of the Constitution, "To promote the progress of * * * useful Arts, by securing for limited Times to Anthors * * * the exclusive Right to their respective Writings * * *", and as this Court said in *Mazer* v. *Stein,* 347 U.S. 201, 219:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement of individual effort by personal gain is the best way to advance public welfare* through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards, commensurate with the services rendered. [Emphasis supplied]

It is in this context that it must be determined whether CATV's retransmissions, for its own commercial purposes, of broadcasts of copyrighted works to the public are or are not performances within the meaning of Sections 1(c) and 1(d) of the Copyright Act. If they are not performances, then the "sacrificial days devoted" to the creation of such programs, symbolized by copyright, are left unrewarded so far as CATV retransmission is concerned, while CATV entrepreneurs are left "reaping where they ha[ve] not sown". *Associated Music Publishers* v. *Debs Memorial Radio Fund,* 141 F. 2d 852, 855 (2d Cir. 1944).

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, *under modern reproductive processes, are entitled to protection;* they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public. * * *. [emphasis supplied]

Thus, the holding that, in retransmitting television programs containing copyrighted works for simultaneous viewing by large segments of the public, CATV does not perform at once denies the "encouragement of individual effort by personal gain", which "is the best way to advance public welfare through the talents" of authors and other creative artists whose efforts alone make the programs possible, and frustrates the essential purpose of copyright and the social ends it is intended to achieve.

As the Court noted in *Southwestern*, Slip Op. 4-9, 16-18, 36 USLW 4554-4556, 4558-4559, the numbers of viewers who receive television programs via CATV has grown, and is growing with such rapidity, and in such proportions, that CATV has become a serious threat to the economic viability of existing television stations, and a strong discouragement to the establishment of new ones.

The Court has expressly refrained from passing on the validity of any of the particulars of the current pattern of the Commission's regulation of CATV, *Southwestern*, Slip Op. 9, 36 USLW 4556, and there can be no assurance that the Commission will continue in its present efforts, through such devices as its "distant signals" rule, to curtail the growth of CATV in the major market and to limit its retransmission of television programs elsewhere. Furthermore, if as the Court has held here, CATV "falls on the viewer's side of the line", rather than the broadcaster's, Slip Op. 8, 36 USLW 4658, and is merely an adjunct to the viewer's receiving set, there may be, as pointed out above, a grave constitutional question as to the extent, if any, that governmental action may be taken which would have the effect of denying the people the "right" to hear and view such programs as they can receive through the use of what the Court here characterizes as being merely "a well-located antenna with an efficient connection to the viewer's television set". Slip Op. 8, 36 USLW 4658. *Cf.*

Griswold v. *Connecticut*, 381 U.S. 479, 482; *Weaver* v. *Jordan*, 64 Cal. 2d 235, 411 P. 2d 289 (1966).

Thus, in one way or another, the numbers of viewers receiving television programs via CATV, both proportionately and in absolute terms, would appear destined inevitably to continue to grow. The Court has noted the Federal Communications Commission's expert judgment of the adverse impact this growth is having and must continue to have on broadcasting as a result of its "dividing the available audiences and revenues". *Southwestern*, Slip Op. 18, 36 USLW 4559. And, in consequence, while the number of viewers of television programs will grow with CATV, so long as the decision here stands, the reward to the creative artists must shrink, as broadcasters become fewer, and their audiences smaller. The end result must be that less and less talent will be attracted to the creation of television programs and that the standard of quality of such programs will inevitably suffer.

Moreover, so long as the decision here stands, its adverse impact on television programs will be augmented by the consequences it holds for the performing artists, who, while not copyright holders, receive the larger part of their compensation out of the royalties the copyright holders receive from licenses. Thus, Charlton Heston, president of the Screen Actors Guild, has testified:[11]

> * * * the Screen Actors Guild is a labor union, and * * * it represents * * * 16,000 members of not a very lucrative profession * * * whose average income is well under $3,000 a year * * * Television programs today bring in the bulk of the revenue for screen actors. Far less than half, only about a third

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[11] Hearings on S. 1006, Before the Subcom. on Patents, Trademarks, and Copyrights, of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., at 205-207 (1966).

of the moneys paid to film actors, come from theatrical film. Television is by far the largest souree of revenue for the members of my union.

And therefore what happens in television is of enormous concern to the membership of the Screen Actors Guild. * * *

* * * a very important factor in the economy of the film actor is the fact that if a program in which he appears is run a number of times, or indeed more than once, he is additionally compensated. For the minimum player this compensation can amount eventually to more than he was originally paid. Without it, he would not earn even the $3,000 annual average he now does.

VI

Certainly, in bringing television programs of "distant" stations into areas for which they were not intended and cannot be viewed or heard, CATV is not a mere aid to viewing. In Fortnightly, half the broadcasting stations, whose programs were carried by petitioner's systems, were distant stations.

As *Southwestern* points out, Slip. Op. 5, 36 USLW 4555, CATV systems serve to perform either or both of two purposes:

> First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

In other words, CATV serves to carry programs of broadcasting stations to areas that such stations would serve, but for topographical peculiarities, which make satis-

factory reception of their signals impossible and, secondly, to import the programs of television stations into areas beyond their transmission range. Here, the record is clear. The CATV systems involved rendered both services in the Clarksburg-Fairmont area. Indeed, the record shows that, but for topographical peculiarities, the Clarksburg-Fairmont area would have been served by only half of the broadcasting stations whose programs the CATV systems in suit carried, while the remaining half of the broadcasting stations whose programs they carried were "distant" stations, whose service areas did not include Clarksburg or Fairmont.[12] Additionally, the programs of two television stations located in the Clarksburg-Fairmont area were capable of reception throughout the area without CATV intervention. Slip Op. 1, 36 USLW 4656; A 36.

In holding that in the circumstances of this case, Slip. Op. 8, fn. 25, 36 USLW 4658, "a CATV system no more than enhances a viewer's capacity to receive a broadcaster's signals" Slip. Op. 8, 36 USLW 4658, the Court necessarily overlooked that the Clarksburg-Fairmont area was outside the service areas of half the television stations carried by the CATV systems here involved and that "the publi for which" a broadcast is "intended", Slip. Op. 10, fn. 28, 30, USLW 4658, 4659, does not include viewers residing beyond the broadcasting station's normal service area. Moreover, as the record makes clear, persons within the Clarksburg-Fairmont area could not receive the programs of the Pitts-

[12] Clarksburg is outside the "A" contour of all of the stations in Pittsburgh, Wheeling and Steubenville. It is also outside of the "B" contour of all three stations in Pittsburgh and of the Steubenville station, and is within a "B" contour only of the station in Wheeling. Fairmont is outside the "A" contour of all of the stations in Pittsburgh, Wheeling and Steubenville, and is outside the "B" contour of one of the three Pittsburgh stations and the Steubenville station. It is within the "B" contour line only of the Wheeling and two of the Pittsburgh stations (E 394, 397, 401, 405, 409). See *Southwestern*, Slip Op. 5, fn. 16.

burgh, Wheeling and Steubenville stations without the intervention of CATV. A 35, 36, 237-241, E 97, 98, 103, 115, 223, 224, 228-232, 234, 235, 237, 239, 258. Under these circumstances, to speak of CATV as doing no more than to "enhance" the capacity of viewers in the Clarksburg-Fairmont area, to receive the broadcasts of television stations in whose service areas they do not live, is directly counter to *Southwestern's* concept of CATV's function in these conditions as being to "*transmit* to subscribers * * * signals * * * entirely beyond the range of local antennas." Slip. Op. 5, 36 USLW 4555.[13]

VII

The holding that CATV does not "perform" is fraught with adverse consequences for broadcasters and the public.

In holding that CATV does not "perform" within the meaning of the Copyright Act, the Court overlooked the adverse consequences to television broadcasting and the public interest of denying copyright protection to television programs with respect to CATV retransmissions of them.

A primary goal of television service in the United States is to make available to the public the most varied and highest quality television programs possible. On first impression, the easiest way to achieve this goal would seem to be to lift all FCC restraints on CATV transmissions of

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[13] The FCC, in its recent decision in *Midwest,* Docket 16786, *supra,* fn. 2, emphasized that it was not the intent of the Commission that residents of San Diego receive signals from Los Angeles. The Commission pointed out that if it had "deemed such a result in the public interest, we would take steps to make Los Angeles signals satisfactorily available off-the-air to the entire San Diego public, by increasing the heights and power of the Los Angeles stations and authorizing the Los Angeles licensees to operate translator and satellite facilities in the San Diego area * * *", 13 Pike and Fischer R. R. 2d at 724 (1968).

distant signals and on the duplication of local programs, and to make available to all viewers throughout the country all the programs broadcast by stations in New York, Chicago, Los Angeles and other great urban centers.

Yet, while superficially promising, such a course would be found on closer inspection to be impracticable because nationwide proliferation of such programs would destroy local broadcasting and defeat the national public policy of encouraging the development of local broadcasting and avoiding the domination of broadcasting by a handful of metropolitan superstations, and the national advertisers who support them.[14]

But in the absence of copyright protection, the FCC regulations currently in effect do not achieve their purpose of protecting local broadcasters from destruction, because the rule banning the importation of distant signals applies only in the 100 top markets and the nonduplication rule, in effect,

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[14] *First Report and Order*, 38 FCC 683, 699-700, text and fn. 22 (1965); *Second Report and Order*, 2 FCC 2d 725, 771-776, text and fn. 54, 779 (1966) Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) p. 11.

An even simpler way of extending the range of selected stations to all corners of the United States would have been the creation of a network of translators and repeaters, to make the programs of the dominant stations available not only to paying subscribers near cable trunk lines in densely populated areas as CATV does, but indiscriminately to all potential viewers throughout the country, including rural areas where CATV cannot operate economically. Seiden, *op. cit.*, pp. 18-22.

The cost of building translators is substantially less than that required to install CATV systems (Seiden, *op. cit.* 25). But the FCC in its concern to develop local outlets of expression has deliberately and as a matter of policy "not turned to an alternative system of program distribution based upon a handful of 'superstations' and a nationwide network of wires, microwave and translators". *First Report and Order* par. 47, 38 FCC 700; *Carter Mountain Transmission Corp.*, 32 FCC 459, aff'd 321 F.2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951.

applies only to network programs.[15] The stations outside the top markets, however, are precisely those which are the least capable of surviving the impact of the unfair competition of CATV, and in addition, these stations depend primarily on the use of programs other than those distributed by the networks. Hence, in order to be effective, the ban on the importation of distant signals would have to be broadened and made applicable to all markets, whether large or small. Such extention of FCC regulation would indeed fully protect local stations but, at the same time, it would inhibit even more than the present rules do, the goal of the national communications policy of encouraging the dissemination of the greatest possible variety of quality programs. Indeed, FCC regulation can only exclude programs from an area, it cannot provide them. Obviously, program service for the public is not improved by banning, *i.e.* blacking out, programs. This is especially true in smaller areas where only one or two local stations operate and where, freed from CATV competition, these local stations would have no incentive to improve or vary the quality of their program service and would even be likely to reduce it.

It is CATV's privileged non-copyright position which is the essence of the problem. As the FCC has said, "while the CATV system and the local broadcaster provide the public with access to the same product—the programs created or sold for distribution through broadcasting stations",

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[15] The Commission states in its *Second Report and Order* with reference to the very limited protection which its prohibition of simultaneous duplication affords to UHF and independent stations that "* * * the non-duplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of independent stations, and non-network syndicated or film programming is not distributed on a simultaneous nationwide basis." 2 F.C.C. 2d 725, 778 (1966). As to the distant signals rule, it is applicable only in the top 100 markets and does not protect local stations in smaller markets. *Second Report and Order*, 2 F.C.C. 2d 725, 782, 783 (1966).

as competitors, they stand on an "unequal footing", in that the broadcaster has to "bargain and pay" for the product, while CATV does not, an "anomaly" which the Commission has characterized as not being "a fair method of competition."[16]

With the application of copyright to CATV, however, CATV and stations are placed on an equal footing, and the necessity for FCC restraints is lessened—permitting free and fair competition and a greater variety of programing for the public. Just as bans on programs cannot improve local programing, so also quality production of programs cannot be stimulated by depriving creative producers of royalties from CATV. In other words, FCC regulation alone, without copyright protection, cannot possibly achieve the objective of the Congressional policy of protecting broadcasters and at the same time improving programing.

Mr. Rosel Hyde, Chairman of the FCC, has recognized that communications regulations and copyright protection may play complementary roles, an arrangement which has worked so well in the television broadcasting field where stations as well as all auxiliary devices for the extension of signals, such as translators, repeaters and satellites,[17] are regulated in their communications aspects by the FCC, but at the same time are held subject to the copyright law, and therefore must recognize exclusive rights granted to competitors in their markets, and pay royalties for the use of copyrighted programs.[18]

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[16] *First Report and Order*, 38 FCC 683, 704-706 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

[17] *First Report and Order*, 38 FCC 683, 703, 704-705 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

[18] *First Report and Order*, 38 FCC 683, 703-705 (1965); *Second Report and Order*, 2 FCC 2d 725, 736-737, 778-780 (1966).

The Commission has recognized that its CATV regulations are fully compatible with copyright protection,[19] and the necessity for copyright protection was emphasized by Chairman Hyde when he testified at a Senate Subcommittee hearing[20] that "the Commission has long recognized that*** copyright is a key factor in the community antenna television field", noting that while there is a divergency of views at the Commission as to the need for FCC regulatory direction of CATV there is, however, "far greater unanimity in the Commission that copyright considerations should play an instrumental role in the CATV field. * * *"

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[19] *First Report and Order*, 38 FCC 683, 704, 740 (1965); *Second Report and Order*, 2 FCC 2d 725, 768-769, 778 (1966). The FCC said in its *First Report and Order*:

> We think it apparent * * * that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs.
>
> * * *
>
> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. 38 FCC 2d at 706.

[20] *Copyright Law Revision—CATV*, Hearings on S. 1006, Sub com. on Patents, etc., Senate Comm. on the Judiciary, 89th Cong. 2d Sess. August 2, 1966, pp. 13, 14. Mr. Hyde during the same testimony also explained (at p. 78):

> Thus, the nonduplication requirements bear quite closely on the copyright question. The broadcast industry competes and pays for programing in the open market; it has developed a system of exclusive rights that are bargained and paid for. For

VIII

The fear here expressed that CATV copyright liability under the decision of the Court below would result in liability for suppliers of television receiving sets, and the owners of apartment house master antennas, is wholly unfounded.

In holding, Slip Op. 6, 7, 36 USLW 4657, that the decision of the Court below that CATV "performed" the broadcasts it distributes would result in copyright liability for owners of apartment houses supplying common antennas for their tenants, shopkeepers who rent or sell television sets, and manufacturers of such sets, the Court overlooked the context of the very brief passage, 377 F. 2d at 877, which it quotes from the opinion below, and, in consequence, overlooked its essential meaning. Thus, on the page preceding the quoted passage, the Court below said:

> In the light of prior decisions and of the policies of the Copyright Act, the result brought about by one of [petitioner's] CATV systems—the simultaneous viewing of [respondent's] copyrighted motion pictures on the television sets of as many as several

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example, a station may pay for the right to show a feature film package in its area for a specified period on an exclusive basis. Or, it may enter into an agreement whereby it gets the right of first call on network programs, and, in turn, gives up to the network very considerable compensation in the form of the division of the proceeds from the sale of time on its facilities. These are the fundamental distribution practices of the broadcast industry's program market which have historically been sanctioned by copyright, antitrust, and communications law.

The CATV is essentially dependent on the broadcast system for its product. Yet CATV presently does not compete in the marketplace for the programing which is the commodity it sells to its subscribers. It is not presently bound by those fundamental practices of the broadcast industry just referred to. Therefore, on its distant city signals, the CATV often brings into the local community the film package or the network program for which the local station has bargained and obtained distribution rights.

> thousand of [petitioner's] subscribers—is fairly characterized as a public performance infringing the copyrights.

Hence, the test adopted by the Court below relates to the extent of the contribution made by the CATV system involved to the *simultaneous viewing of television broadcasts of copyrighted works in more than 60% of the housing units in the towns of Clarksburg and Fairmont,* rather than to CATV's contribution to the television reception by individual viewers, as such. Accordingly, the *ratio decidendi* of the Court below would not lead, as the Court assumes, to treating shopkeepers who sell or rent television sets or television set manufacturers as infringers. For, while supplying the means of reception that contribute to each set owner's viewing, they do not contribute to the *transmission* of programs for simultaneous viewing by members of the public, which forms the basis of the concept of public performance by means of electronic transmission.[21] Moreover, since by viewing, viewers do not in any event infringe, even if the performance they watch does, it must be clear that those who manufacture or sell or rent television receiving sets to viewers would in no circumstance be subject to liability for infringement. Accordingly, if CATV were held liable for infringement on the basis of the test of the Court below, it would not

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[21] In recognizing that broadcasters "perform", i.e., "publicly perform" within the meaning of the Copyright Act, Slip Op. 8, 36 USLW 4658, this Court cited in fn. 23, and impliedly approved the reasoning of *Jerome H. Remick & Co.* v. *American Auto Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925), that a broadcaster "performs" in the sense of the Copyright Act because he "is consciously addressing a great, though unseen and widely scattered, audience", notwithstanding that each member of the audience "may enjoy" the broadcast "alone in the privacy of his home". The Court below properly summarized *Remick* and subsequent cases as holding, 377 F.2d at 879, that:

> a broadcast or other transmission of a work to the public or cross-section of it results in the public performance although each individual who chooses to enjoy it does so in private.

follow that makers, vendors or lessors of receiving sets would similarly be liable.

So far as concerns apartment house master antennas, it may first be observed that apartment house owners are no more engaged in communications because they furnish antennas for the use of their tenants than they are in laundering or catering because they supply their tenants with washing and drying machines and cook-stoves. Moreover, it is common knowledge that the landlord's purpose in supplying a master antenna for use by his tenants, and the function it is intended to serve, is to keep the building's roof free of the jungle of antennas it would otherwise sprout if each tenant were to erect his own antenna. In this way, the landlord avoids the burden of policing the erection of a host of antennas and seeing to their proper maintenance, lest he incur liability for negligence if any should fall, and he keeps the roof clear of obstacles that might impede the fighting of fire and prevent its full utilization for recreational and other purposes.

In assimilating CATV to apartment house master antennas, and vice-versa, the Court overlooked the expert judgment of the Federal Communications Commission, *Second Report and Order*, 2 FCC 2d 725, 780 (1966):

> The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. * * * If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programing carried over the New York independents.

The latter is precisely the case of the CATV systems serving Clarksburg and Fairmont.

IX

The legislative history of the Copyright Law Revision Bill lends no support to the holding in this case and emphasizes the need for rehearing.

The decision misapprehends the legislative history of the so-called "CATV provision" of the pending Copyright Law Revision Bill. The Court says in *Fortnightly* that the "CATV provision" was deleted by the House "in order to refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications".[22] But, reference to the facts surrrounding this quotation reveals the very opposite conclusion than that for which the quotation was cited.[23] Furthermore, it

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[22] Slip Op. 5, 6, fn. 17; 11, 12, fn. 33, 36 USLW 4657, 4659.

[23] The deletion of the "provision dealing with CATV" (Slip Op. 6, fn. 17, 36 USLW 4657) and the statement of Congressman Moore quoted in the Court's footnote 33, Slip Op. 11, 36 USLW 4659, must be understood in the light of the retention by the House of Section 106(4) of said Bill which grants to the owner of copyright the exclusive right "to perform the copyrighted work 'publicly' ", and Section 101 which defines the right so granted in a manner clearly including CATV.

That the House, in preserving the general copyright applicability to CATV transmissions under Sections 101 and 106, did so intentionally appears in the colloquy between Congressmen McClory and Ottinger (113 Cong. Rec. H. 3858, April 11, 1967) and in the further clarifying remarks of Congressman Ottinger (113 Cong. Rec. H. 4468, April 20, 1967).

The deleted Section 111 merely contained limited copyright *exemptions* for certain specified types of CATV transmissions, but even these limited exemptions were subject to certain exceptions which would have excepted all CATV systems engaged in the origination of programs or in pay television from the benefit of the exemptions. It was to these exceptions from the exemptions that Congressman Moore addressed himself in the passage quoted by the Court in footnote 33 when he criticized Section 111 as dealing with matters of "communications policy" which, he felt, were "not a proper functio[n] of copyright".

was also the sense of the House that "the Committee on the Judiciary would have primary concern over copyrights" and that the Committee on Interstate and Foreign Commerce would have primary concern over "regulation of CATV".[24] The House did not decide that the rights of creators and owners of copyrighted works should be regulated by the Federal Communications Commission.[25]

Also, an effort to exempt CATV from copyright liability was defeated.[26] Congressman Celler stated the overwhelming opposition to such special privilege (113 Cong. Rec. H. 3880):

> * * * why should CATV be free from payment of copyright royalties? Why should it get the preference which is not accorded all other industries? TV pays royalties. Radio pays royalties. Juke boxes will pay royalties. Cabarets will pay royalties. Concerts pay royalties. Movies pay royalties. Theatres pay royalties. But we have now an invidious distinction, a preference which is utterly unjustified with reference to CATV. * * *
>
> Let us see what CATV really is and see who are the people that the gentleman from West Virginia wants to help. There are 1,502 such television systems that pick up, as it were, programs from TV-licensed stations and networks and siphon off programs which, according to what the amendment would imply, would charge the listeners fees, but would pay nothing in the way of royalties to that which is the sine qua non of CATV, the work of the

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[24] Remarks of Congressman Celler, Chairman of the Judiciary Committee, 113 Con. Rec. H. 3857 (April 11, 1967).

[25] See the remarks of Congressman Staggers, Chairman of the Committee on Interstate and Foreign Commerce, *ibid.*: "If the CATV-TV provision is brought up in our committe and the matter of copyright is involved, it will go to the Committee on the Judiciary for their consideration."

[26] Amendment to Copyright Law Revision Bill introduced by Congressman Moore, 113 Cong. Rec. H. 3880 and defeated 113 Cong. Rec. H. 3883, April 11, 1967.

> creative artists: So they would pay nothing to the authors of the poetry, to the dramatists, to the song-writers, whose work the CATV would appropriate. They would become free riders. I cannot accept that. I cannot stomach that, especially in view of the arrangement that has been made.

However, the deletion of § 111 and the defeat of the total exemption for CATV is no indication that Congressional amelioration of the consequences of the Court's decision here is near at hand. As of now, the matter is dormant.

So far as concerns the likelihood of copyright legislation in the reasonably foreseeable future, it must be recalled that the history of the effort to bring about copyright revision in the Congress has been long and tortuous. For a decade or more, the Copyright Office, the copyright bar and the professions and industries concerned with copyrighted works have labored to that end, wholly without success to date. Thus, the Register of Copyrights said in his remarks, made at a meeting held under the auspices of the Senate Subcommittee on Patents, Trademarks and Copyrights on April 18, 1968, that the prospect for copyright revision presented a "gloomy picture" and that

> [t]o assume that next year the bill as a whole will stay intact, that the remaining issues will be resolved readily, that existing accommodations will stick, that no new major issues will arise, and that the bill will go easily through both Houses, is simply to ignore the lessons of experience.

Indeed, a number of thorny and highly complex problems [27] are newly arisen, and a resolution of any one of

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[27] e.g., the right to use copyrighted materials for teaching and learning purposes or in electronic storage and retrieval systems; the right to duplicate copyrighted works by means of xerographic high-speed duplicating devices for office or classroom use; the protection of the rights of performing artists through copyright, etc.

them, no less than the resolution of them all, is likely to keep copyright revision in a mire of indecision for years to come.

The New York Times in an editorial of June 24, 1968, p. 36, commented on this point. After referring to CATV as "a form of piracy", it continued:

> To make it all sadder, anyone who has followed the excruciating history of the unsuccessful attempts to modernize the copyright laws in Congress in the last decade knows that the private-interest lobbies have shown too much political muscle to permit great hope for legislative rectification of the injustice.

We do not argue that the unlikelihood of Congressional relief is the Court's concern. It is, rather, that the legislative history of the Copyright Law Revision Bill lends support neither to the Court's holding here, nor to any expectation that its shattering effect on the whole fabric of copyright may soon be repaired by the Congress. It is in this circumstance that the Court is urged to reconsider its decision and to adhere to the hitherto firmly rooted principles on which copyright protection has been based.

X

Granting the petition for rehearing and affirmance of the decision below would preserve the existing business relationships which the reversal has jeopardized.

The opinion here refers to *Jewell-LaSalle* as "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context * * * ".[28] Such a disposition of a landmark case in the field of copyright, long considered the authority in regard to other than "live" performances, is surely unwarranted in the light of the extent to which its teachings have become a fountainhead from which an entire branch of the law has developed.[29]

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[28] Slip Op. 10, fn. 30, USLW 4659

[29] The failure of what are but two groups of owners of copyrights on musical compositions (ASCAP and BMI) fully to enforce their rights under *Jewel-LaSalle*, Slip. Op. 10, fn. 30, dissent fn. 3, 36 USLW 4659, 4660, certainly cannot serve to overrule a landmark decision of this Court, or to diminish its force, or effect either as precedent or as a carefully reasoned and unimpeachable statement of basic copyright principles. These principles as expounded in *Jewel-LaSalle*, have been followed as precedents and applied in a great number of situations "outside its own factual context", e.g., *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70, 76 (1st Cir. 1932), same case on remand 3 Fed. Supp. 66, 72 (D.C. Mass. 1933); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 54 (2d Cir. 1936); *Harms* v. *Sansom House Enterprises, Inc.*, 162 Fed. Supp. 129, 133, 135 (E.D. Pa. 1958), *affd. sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Society of European S.A.A.C.* v. *New York Hotel Statler Co.*, 19 Fed. Supp. 1, 4 (S.D. N.Y. 1937); *Buck* v. *Newsreel, Inc.*, 25 Fed. Supp. 787, 789 (D.C. Mass. 1938); *Famous Music Corp.* v. *Melz*, 28 Fed. Supp. 767, 770 (W.D. La. 1939); *Buck* v. *Gibbs*, 34 Fed. Supp. 510, 515, fn. 6 (D.C. Fla. 1940), mod. on other gr. *sub nom. Watson* v. *Buck*, 313 U.S. 387; *Buck* v. *Cecere*, 45 Fed. Supp. 441 (W.D.N.Y. 1942); *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288, 290, 291; *Tiffany Productions, Inc.* v. *Dewing*, 50 F. 2d 911, 914 (D.C. Md. 1931); *M. Witmark & Sons* v. *Jensen*, 80 Fed. Supp. 843, 847 (D.C. Minn. 1948); *Beban* v. *Decca Records*, 169 Fed. Supp. 829, 830 (S.D. Cal. 1959).

The Court suggests that to have followed *Jewell-LaSalle* would "hardly" have "preserved" business relationships, and would have been "retroactively to impose copyright liability where it has never been acknowledged before". Slip Op. 10, fn. 30, 36 USLW 4659. This overlooks the fact that whenever the law is applied to a new technique pursuant to the statutory language "in any manner or by any method whatsoever" (Sec. 1(c) and 1(d) of the Copyright Act), liability is necessarily imposed where it never had been "acknowledged" before. As the Court is well aware, however, the books are replete with such cases going for the plaintiff, and were it not so, sterility and atrophy, rather than a capacity to meet the demands of a dynamic society, would be the hallmarks of the law. The Court's suggestion and its rejection of the well established teachings of *Jewell-LaSalle* combine uniquely at once to deny both phases of "the great antinomy" of the law, that "Law must be stable, and yet it cannot stand still". Pound, *Interpretations of Legal History* (Macmillan, 1923) 1; see Cardozo, *The Growth of the Law* (Yale University Press, 1924) 2.

The holding here denies to the law of copyright both stability and the ability to move forward to meet the challenges of new technological advances. In so doing, it threatens the disruption of legitimate business relationships of long standing, predicated upon what was heretofore established principle, not only in respect to what consitutes a performance, but in regard to the law's viability and adaptability. If CATV is without copyright liability, what of the more than 2,000 UHF translators, whose operators have long "acknowledged" copyright liability for their retransmission of copyrighted television programs into "areas in which direct reception of such television broadcast stations is unsatisfactory due to distance or intervening terrain barriers",[30] and the operation of which differs from CATV's retransmission of such programs only in that they retransmit through the air while CATV uses a cable?

[30] 47 CFR § 74.731(a), *supra* fn. 7.

The decision here holds the direst forebodings, too, for the thousands of writers, composers, actors and others whose principal source of income is now television, rather than the older forms of entertainment, such as the stage, the screen, and the concert hall. Their future is, indeed, black, if CATV can freely exploit the product of their creativity and labor.[31] For, it must be doubtful whether the growth of CATV will be stemmed, and the prospect of new technological developments which, under the holding here, may share CATV's freedom from copyright liability can only serve further to encourage artists to employ their talents otherwise than in television. In the long run, no less than the short, this cannot but adversely affect program quality and the public interest.

It is of the utmost signifiance that responsible leaders of the CATV industry have acknowledged the suitability of copyright liability to their industry and that "copyright fees are a normal cost of doing business"[32] and that the

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[31] *The New York Times* in the editorial cited *supra* p. 37 entitled Technology and the Law, commented:

* * *[T]he decision created a regrettable precedent that fails to deal equitably with the new economic relationships affecting intellectual property in an era of technological revolution—a precedent we hope will not prove the last word in this rapidly moving field.

* * *

What makes this view of CATV as a passive instrument particularly astonishing is that only a week earlier the same Court ruled that CATV is subject to the regulatory authority of the Federal Communications Commission.

The crucial problem, with which the Supreme Court failed to deal realistically, is that CATV systems take other people's property —when they retransmit a televised original play, for example—and sell it for a profit. Under the Court's decision, CATV entrepreneurs are relieved from any need to compensate the creators and owners of this copyright material.

[32] Statement of J. Leonard Reinsch, a former director of the National Community Television Association, in the Bulletin of said Association of July 18, 1966, quoted in the letter dated September 6, 1966, from the American Society of Composers, Authors and Publishers to Senator Quentin N. Burdick, which is printed in Hearings before the Subcommittee on Patents, Trademarks and Copyrights, *supra* fn. 20 at p. 237.

effect of such payments "will not be materially adverse" to the operator.[33]

On the theory that relief which may be oppressively extreme should not be granted at all, CATV has raised the spectre of multimillion dollar damages—on the assumption that statutory damages must be awarded if the holdings below of copyright infringement were affirmed (Brief of National Cable Television Association, Inc. *amicus curiae* 20, text and fn. 36). This contention is based on a misconception of the applicable law. Decisions of this Court make it clear that a District Court has a discretionary choice to award actual damages or profits which would, in fact, limit the recovery to petitioner's unjust enrichment, or to award statutory damages within the range prescribed by Section 101(b). As this Court said in *F. W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 231, 234:[34]

> * * * [T]he statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.
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[33] Corporate prospectus of Teleprompter Corporation, a major CATV operating chain, quoted in the letter from the American Society of Composers, Authors and Publishers to Senator Quentin N. Burdick, *supra* fn. 32.

[34] See also, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940); *Davilla* v. *Brunswick-Balke-Collender Co. of New York*, 94 F. 2d 567, 569, 570 (2d Cir. 1938); *Washingtonian Pub. Co., Inc.* v. *Pearson*, 140 F. 2d 465 (D.C. Cir. 1944); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236, 240 (9th Cir. 1966) modifying in other respects, *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (S.D. Cal. 1963), and 243 F. Supp. 999 (S.D. Cal. 1965); *Woodman* v. *Lydiard-Peterson Co.*, 192 F. 67, 71 (D.Minn. 1912); *Davis* v. *E. I. DuPont de Nemours & Company*, 249 F. Supp. 329 (S.D.N.Y. 1966).

> We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon profits and damages or one estimated within the statutory limits is more just.

Even if the copyright owners were to survive the defenses of laches, estoppel and implied license, which the the District Court reserved for later trial (A 74), the issue of damages (also so reserved) would be subject to the court's discretion and would come to this Court for further review.

XI

Summary of Highlights

Reconsideration of the decision here is necessary because the Court overlooked the following disastrous and unintended consequences of its decision:

1. The decision is wholly incompatible with that of this Court in *Southwestern*. If CATV, as *Fortnightly* holds, falls indeed "on the viewer's side of the line", the beneficial effect of *Southwestern* will be dissipated and grave questions will arise as to whether the the FCC, by regulation, may, within constitutional limits, prevent the unfair competition of CATV which threatens to destroy local broadcasting stations.

2. The decision is fraught with adverse consequences to the public and to authors, because in the absence of exclusivity patterns freely negotiated under copyright, as television stations do, the FCC can protect local stations against CATV inroads only through the blacking out of programs from distant stations, which neither serves the interest of the public in getting a greater variety and better quality of programs, nor aids the social end of the Copyright Act to reward and encourage the talents and efforts of creative producers through the payment of royalties.

3. The decision gives CATV systems a unique and privileged position in the television industry in that they may bring to their audiences for their own commercial purposes, copyrighted programs for the use of which they do not pay. A commissioner of the FCC, Robert E. Lee, has referred on two occasions to this unprecedented privilege as a "license to steal".[35]

4. In absolving CATV from liability on the ground that it merely does for viewers what each viewer can do for himself without copyright liability, the Court departs from the hitherto well settled principle of copyright law that a public performance is an infringement even though the same performance in private is not.

5. The decision here, in failing to apply the Copyright Act to CATV, which is only the latest of the novel means of transmission to the public, has abandoned the protection afforded the artist over the past half century, however novel the means were to exploit his work, whether motion pictures, radio, television or wire transmission to restaurants. The decision here has therefore created an upheaval in the copyright realm which is as unmeasurable as the fear that earlier novel methods of transmission considered subject to copyright now may be deemed unrealistically "to fall on the viewer's side of the line" (as if public performance could be defined by balancing in such scales) and the greater fear that future technological ingenuity may inherit CATV's unjust mantle of immunity.

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[35] Commissioner Lee so characterized the use of television programs by CATV in remarks before the Midwest Conference on Intergovernmental Communications held in Lincoln, Nebraska, on June 20, 1968, after referring to the "wired city or the wired nation" scheme to transfer all of television to cables. His remarks were further clarified in an interview reported in the *CATV Weekly* of July 1, 1968 p. 40, wherein he referred to CATV's free use of programs as a "license to steal".

When the commercial forces involved are examined, the frailty of the decision here is weighted with inequity of a profound moral nature. The enterprises operating CATV even in the present early phase number among them large affluent industrial complexes[36] which are absolved from making any payment to thousands of writers, composers, actors and crafts, whose works they use. Since it is already clearly on the horizon that CATV will become a billion and one-half dollar industry in a few years and that 59,000,000 homes[37] will be wired by CATV,[38] thus diminishing the average artist's present pitifully small income[39] from other

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[36] Among the industrial giants owning chains of CATV systems are General Electric Co.; General Telephone & Electronics; Westinghouse Electric Corp.; Time-Life, Inc.; Teleprompter Corp.; Triangle Publications, Inc.; Scripps-Howard Broadcasting, Inc.; General Instrument Corp., the owner of the Jerrold chain of CATV systems; H & B American; Avco Corp.; National General Corp. Television Factbook, Services Volume, 1968-69 Ed. No. 38. *CATV Weekly*, July 22, 1968, p. 6, reports that H & B American Corp. owns 37 CATV systems serving approximately 129,000 subscribers and just bought for roughly $35,000,000, the interest of Jack Kent Cooke and General Television, Inc., which owned 20 systems serving approximately 81,000 subscribers, including those in Clarksburg and Fairmont, here in litigation.

[37] The *Wall Street Journal* of July 15, 1968, p. 3, predicts big gains in CATV revenues and equipment sales "sparked by the recent Supreme Court decision that exempts CATV operators from any copyright liabilities." The *Wall Street Journal* also reports estimates "that about half of the 59 million TV homes in the U.S. will be connected with community antenna or cable-TV systems within five years" reaching yearly revenues of 1.8 billion as compared to 170 million in 1967.

[38] See *Southwestern* Slip Op. p. 6 text and fn. 18, 36 USLW 4555, noting the suggestion that "a nationwide grid of wired CATV systems interconnected by microwave frequencies and financed by subscriber fees, may one day offer a viable economic alternative to the advertiser-supported broadcast service".

[39] See testimony of Charlton Heston, cited *supra*, pp. 23, 24, text and fn. 11.

sources—the abandonment of copyright's traditional role as the protector of the arts is of the deepest concern.

From the public viewpoint there is added the imponderable, but weighty, consideration that the frustration of the artist and the copyright owner caused by denying to them recompense for the product of their creativity and investment, tends further to diminish the quality of entertainment already deemed deplorable by so many.

The instant decision falls well within the special boundary lines which should prompt the Court to grant rehearing.

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The undersigned counsel for respondent hereby certifies pursuant to Rule 58 of the Rules of this Court that the foregoing petition is presented in good faith and not for delay.

/s/ LOUIS NIZER
Counsel for the Respondent

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

—v.—

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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INDEX

	PAGE
Motion For Leave to File Brief on Behalf of The Authors League of America, Inc. as *Amicus Curiae*	1
Interest of The Authors League	3
Summary of Argument	4
POINT I—In interpreting the word "performance" the Court overlooked the provisions of Section 1(e) of the Copyright Act which demonstrates that the CATV industry's use of copyrighted works constitutes a "public performance"	5
The Premises on Which the Majority Opinion is Based are Inconsistent with Section 1(e)	8
The Viewer "Performs"—but he does not "Publicly Perform"—the Work	9
CATV's "Enhancement" of Its Customers' Reception is Public Performance	10
CATV's Use of Copyrighted Materials Is Sufficiently "Active" to Constitute Infringement	12
POINT II—CATV's communication of copyrighted works violates the other rights granted in Section 1(d)	14
POINT III—The creation of a CATV exemption is inconsistent with the purpose and constitutional mandate of the Copyright Act and will damage authors, the public and non-commercial television	16
The Decision Creates a "Jukebox Exemption for CATV	17
CONCLUSION	21

TABLE OF CASES

	PAGE
Atlantic Cleaners and Dyers v. U.S., 286 U.S. 427 ...	8
Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F. 2d 303	7
Committee Report (No. 2222, 60th Congress, 2nd Sess.)	7
Ex Parte Public Bank, 278 U.S. 101	15
Ferris v. Frohman, 223 U. S. 424	17
Herbert v. Shanley Co., 242 U. S. 591	16
Irving Berlin, Inc. v. Daigle, 31 F. 2d 832, 833	7
Kalem Co. v. Harper Bros., 222 U.S. 55 (1911)	8
L. C. Page & Co. v. Fox Film Corporation, 83 F. 2d 196	3
Mazer v. Stein, 347 U. S. 201 (1954)	16
Shapiro, Bernstein & Co. v. H. L. Green Company, 316 F.2d 304	12
Skovgaard v. The M/V Tungus, 252 F. 2nd 14; aff'd 358 U.S. 588	15

Miscellaneous

Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress, 1st Session, p. 32	6, 8

Copyright Act

Section 1	3
Section 1(c)	4, 5
Section 1(d)	4, 5, *passim*
Section 1(e)	4, 5, *passim*
Section 9	3

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UNITED ARTISTS TELEVISION, INC.

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MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

The Authors League of America, a national society of writers and dramatists, respectfully moves for leave to file the annexed brief, *amicus curiae,* in support of the petition for rehearing. Counsel for the Petitioner has consented to the filing of the brief; counsel for the Respondent has refused to consent.

The Court's decision sharply curtails the rights of authors of plays, motion pictures, television dramas, musical and other works which are communicated by CATV systems to their subscribers. It will deprive these authors of compensation for the use of their works in the rapidly expanding medium of CATV. It will also have adverse effects for the public, and for educational, public and commercial

television—by reducing the number of plays, motion pictures and other works that are made available for broadcasting by non-profit and commercial stations.

Counsel for the applicant is familiar with the questions involved in this case and scope of their presentation and believes there is a necessity for additional arguments on the points specified in the brief of The Authors League.

Because the issue involved is of vital concern to American authors, The Authors League respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

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Attorney for The Authors League of America, Inc., Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

—v.—

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.

Interest of The Authors League

Although the word "author" is not used once in either the majority or dissenting Opinions, the decision of the Court is nonetheless of tremendous importance to American authors who write the motion pictures and television programs which constitute the stock in trade of the CATV industry. It is unfortunate that the basic issue—the interpretation of rights granted to the *author* in Section 1 of the Copyright Act (see Section 9)—was resolved in the context

of a dispute between corporations that produce motion pictures and the rapidly expanding CATV industry. In this context, the fact that it is the author's rights which are at stake seems to have been lost sight of, with the unfortunate consequence that the Court has construed Sections 1(c) and 1(d) of the Act to allow a vast industry to communicate works of American authors to "additional viewers" for profit while denying the right of the authors to share in income which their works produce.

The Authors League is a national society of authors and dramatists. Many of its members have written books and plays which have been adapted into television programs and motion pictures exhibited on television. A substantial number also write motion pictures and dramas for television; and a number write music. The income of these authors depends on the proceeds received by the producers of these works; frequently, they are compensated by a share of these proceeds.

Summary of Argument

We respectfully submit that CATV's communication of copyrighted works to audiences of viewers is an activity encompassed by the rights granted to authors of dramatic works in Section 1 for the following reasons:

1. This Court overlooked a provision of the statute which plainly shows that the Congress did not intend the narrow interpretation of "performance" which the Court adopted. The "Juke-box" exemption of Section 1(e) establishes that the term "public performance" was intended by Congress in 1909 to include the furnishing of performances of copy-

righted works to the public "in any manner or by any method whatsoever"; and that the term was intended to include uses such as that the CATV industry makes of copyrighted works.

2. CATV's use of copyrighted works is also encompassed by the rights granted the authors of copyrighted works to "exhibit", to "represent", to "produce" or to "reproduce" his dramatic work—*"in any manner or by any method whatsoever."* (Emphasis supplied)

3. The creation of a CATV exemption from the rights granted authors in Sections 1(c) and (d) is inconsistent with the fundamental purpose of the Copyright Act and the constitutional mandate for it and will not only deprive authors of compensation for profitable uses of their work but will also damage the public, and commercial and non-commercial television by deterring the release of copyrighted works for exhibition in these media.

POINT I

In interpreting the word "performance" the Court overlooked the provisions of Section 1(e) of the Copyright Act which demonstrates that the CATV industry's use of copyrighted works constitutes a "public performance".

We respectfully submit that CATV's carrying of performances of copyrighted motion pictures and other copyrighted works to its audiences ("additional viewers") is an act of "public performance" in the sense that Congress used the term in Section 1 of the 1909 Copyright Act. This meaning is established as indicated below by the provisions of Section 1(e) of the Act. Moreover, Section 1(e) indicates

the invalidity of certain fundamental premises on which the majority opinion rests.*

Section 1(e) grants the author of a musical composition the right "to perform the copyrighted work publicly for profit." Section 1(d) grants the author of a dramatic work the same right—without limiting it to performances "for profit." In the last paragraph of Section 1(e), Congress granted a partial exemption** from the "public performance" right to certain proprietors of the coin-operated phonograph (the "jukebox"):

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

It is obvious that Congress understood the act of furnishing the public with performances of copyrighted songs by means of commercially operated phonograph machines was a "public performance," as it used the term in 1909. Section 1(e) did not create a separate right of performance by phonograph machines. It simply exempted certain types of

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* While the following discussion of the meaning of "public performance" considers only this aspect of the issue, we respectfully submit that the reasoning of the Court of Appeals and the arguments made in the briefs of Petitioner and various *amici curiae* in the appeal also support the conclusion that CATV is engaged in a "public performance" of copyrighted works when it carries broadcasts of them to its subscribers.

** "The jukebox exemption is a historical anomaly. The exemption was placed in the law in 1909 at the last minute with virtually no discussion. The coin-operated music machines of that day were apparently a novelty of little economic consequence. The jukebox industry is now among the largest commercial users of music, with an annual gross revenue of over a half-billion dollars." (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress, 1st Session, p. 32.)

commercially operated phonographs from the general "public performance" right. As the Committee Report (No. 2222, 60th Congress, 2nd Sess.) makes clear, the exemption is an "*exception* regarding the *public performance* of a musical composition on coin-operated machines" where admission is not charged (p. 9). (Emphasis supplied.) Where "admission is charged, the operation of a coin-operated machine violates the general "public performance" right. Moreover, the use of a non-coin operated machine to furnish performances to the public is a "public performance" and, if unauthorized, violates the author's copyright (the "jukebox" exemption does not refer to non-coin operated machines). *Irving Berlin, Inc.* v. *Daigle,* 31 F. 2d 832, 833; *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.,* 334 F. 2d 303.

Section 1(e) thus establishes that Congress used the term "public performance" to include not only the staging of a performance of a copyrighted work but also the independent act of providing the public with a performance staged by someone else. The proprietor of a jukebox (or other commercially operated phonograph) has no relation to the staging of the original performance—the playing and singing of the song in the studio of the record company. He simply furnishes that performance to the public. That is what the public pays him for. That is how he exploits the copyrighted work. That is his act of "public performance." Unless he has received the author's permission (or is protected by the jukebox exemption) he is guilty of infringing the author's right of public performance.

Since the right "to perform the copyrighted work publicly" as used in Section 1(e) includes the separate act of furnishing performances to the public, it has the same mean-

ing when used in Section 1(d), with respect to dramatic works. As the Court held in *Atlantic Cleaners and Dyers* v. *U.S.*, 286 U.S. 427: "There is a natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." (P. 433)

We respectfully submit that CATV, like the proprietor of a jukebox or other commercially used phonograph, is furnishing audiences with performances of copyrighted works staged by others, and therefore is giving a "public performance" of these works. The CATV system and the jukebox proprietor each use someone else's authorized dissemination of a performance to retransmit the work to their customers. The jukebox proprietor uses phonograph records of a performance, which were made and disseminated by permission of the author. The CATV system uses the broadcast of a performance (or of a film or tape recording of it) which was disseminated by permission of the author. That CATV uses different machinery does not alter the fact that it is engaged in the same act as the jukebox proprietor—furnishing performances to the public. As Mr. Justice Holmes concluded in *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911), the rights granted an author in the Copyright Act of 1891 to dramatize his work included the right to furnish performances to the public by motion pictures, "although the machinery is different and more complex" than the "live" performance which was the only method of communicating dramatic works when the 1891 Act was written (cf. *L. C. Page & Co.* v. *Fox Film Corporation*, 83 F. 2d 196).

The Premises on Which the Majority Opinion is Based are Inconsistent with Section 1(e)

The majority opinion concludes that CATV is not engaged in a public performance because its customers "view"

rather than "perform" the programs they receive; and it merely enhances their capacity to view, providing them with the improved reception that they could have had if they had purchased the necessary equipment themselves. Section 1(e) refutes this argument.

The Viewer "Performs"—but he does not "Publicly Perform"—the Work

For the reasons indicated below, it is irrelevant whether or not each of the CATV system's customers is deemed to "perform" the copyrighted works which the system provides to him. However, the conclusion that the viewer does not "perform" the work by operating the television set is erroneous. Section 1(e) establishes that the operation of a phonograph by a listener is a "performance". The same activities are involved whether he plays a phonograph in his home or a coin-operated machine in a dance hall. Playing the machine in a dance hall is a performance—and an infringement (if admission is charged).* Obviously, it is a performance to play the machine in his home. The vital distinction is whether the "performance" is public or private. Since the authors of dramatic and literary works are granted the right of public performance, when an individual operates his phonograph in his living room, he does not infringe because the performance is private.

A television set serves the same purpose as a phonograph machine. It translates signals into sight and sound, just as the phonograph translates into sound the electrical energy created by the vibrations of the needle. The operation of a television set by a viewer is an act of performance just as is the operation of a phonograph machine by a listener. An

* It would also be infringement if a non-coin operated machine were played by the proprietor.

individual viewing a copyrighted work on his set also performs the work—but does not infringe because his performance is private.

However, a CATV system does not view performances. It furnishes them to many individuals—collectively, a public audience. Its act of performance is public rather than private.

CATV's "Enhancement" of Its Customers' Reception is Public Performance.

The majority opinion concludes that a CATV system does not publicly perform because it accomplishes the same result which its individual customers could obtain by buying and operating their own antenna and amplifying equipment.

Individual viewers cannot afford to acquire or operate the complex and costly equipment a CATV system requires; and the antenna equipment which individual customers can afford, does not receive the programs which a CATV system carries in from distant stations. But this is irrelevant from a copyright viewpoint.

An individual can buy a record and play it on his phonograph machine—without an infringement occurring. But if a radio station provides him with the same performance by playing the record, or if a proprietor of a jukebox or other commercially used phonograph machine brings him the same performance from the same record, an infringement occurs. Under the Copyright Act an individual is free to make various uses of a dramatic or musical composition, which would be infringement if provided for him (as a member of the public) by an entrepreneur, for profit. As noted, the Act makes a basic distinction between a public and private performance.

Moreover, CATV is not a mere adjunct of its customer's set. On the contrary, the customer's set is a part of a complex commercial system for furnishing performances to a public audience. So long as his set is connected to the CATV system, he receives only those performances which it chooses to bring him. If it were not carrying a local station, he could not receive the station's programs while his set is part of the CATV system—although he could if it were disconnected from the system. On the other hand, he receives programs broadcast by distant stations which he could not receive were his set operating independently of the system. The control of the system's contents rests solely in the hands of its proprietor, not of the individual viewer. The CATV system determines what will flow over its channels. Thus the District Court found:

> "Defendant's systems preselected the stations whose programs were provided to its subscribers; and supplied some of said subscribers with programs contrary to their expressed preference, and in some instances, even contrary to the expressed preference of most of the subscribers." 255 F. Supp. at 188.

Indeed, the customer's set is usually operated by a special selector knob installed by a CATV system rather than by the dial built on by the manufacturer. As in the case of the jukebox, the customer plays a part in operating the system—he turns the knob to select from among the performances which it makes available. But as in the case of the jukebox, this does not alter the fact that the proprietor of the system is engaged in a public performance.

CATV's Use of Copyrighted Materials Is Sufficiently "Active" to Constitute Infringement.

The majority opinion also concluded that a CATV system did not engage in public performance because it did not procure or propagate broadcasts. The Copyright Act does not require that a commercial user of copyright works must actively participate in selecting or propagating performances as a condition of liability for infringement. On the contrary, the Act has been interpreted to prohibit entrepreneurs from exploiting the performance of copyright works even though their role in the performance was totally passive. For example, in *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, 36 F. (2d) 354, it was held that the proprietor of a dance hall was liable for infringing copyrighted musical compositions performed in his establishment even though he "did not direct the playing of any selection, and did not know that any musical selection played by the orchestra was copyrighted" and although the orchestra was an independent contractor. As the Circuit Court there pointed out, the proprietor is guilty of infringement "if the playing be for [his] profit." (Cases cited, page 355). See also, *Shapiro, Bernstein & Co.* v. *H. L. Green Company*, 316 F. 2d 304 (cases cited pp. 307-308).

Moreover, Section 1(e) makes it clear that CATV cannot be absolved on any theory of passivity. CATV is a far more active participant in the process of communicating performances to the public than is the proprietor of a coin-operated phonograph machine. The latter simply stocks his machine with records and leaves it to the customer to turn on the machine and select the compositions to be performed. He does not actively participate in the communicating of the performances. Nonetheless, Congress understood that this pas-

sive act of communication, by an entrepreneur, was a "public performance" and only exempted it from liability if admission was not charged.

By contract, a CATV system is far more actively engaged in the process of providing performances to its audiences. Its machinery is more sophisticated and expensive than the jukebox. It must be constantly operated by the proprietor and his employees. They select the stations, distant and local, whose programs it will carry. They can determine which of a given station's programs it will or will not carry. (255 F. Supp. at p. 188, quoted supra, p. 10) A CATV system is thus much more actively involved in furnishing copyrighted works to its audiences than is the proprietor of a jukebox.

Indeed, it is at least as actively involved as the local television station which merely retransmits broadcasts originated by the network with which it is affiliated. The District Court's opinion demonstrates this conclusively.* In terms

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* "Four typical distribution systems are used to extend television service;

1. Regularly licensed television broadcasting stations receive the signals of other television stations by direct off-the-air reception or by a coaxial cable or microwave link system from a network originating source and then distribute the signals by rebroadcasting them;

2. UHF translators . . .

3. VHF repeater stations . . .

4. CATV systems . . .

The electronic processes and equipment employed by all of these distribution systems for the reception, reproduction and transmission of the electromagnetic waves representing television programs originated by other television stations or network studios are basically the same in purpose, function and design." 255F. Supp. at 195.

"Defendant's systems, with respect to each channel received, perform a function substantially identical to that of a network affiliated station, UHF translator, or VHF repeater in that they all not only receive but also retransmit signals originated elsewhere." 255 F. Supp. at 196.

of capital investment, cost of operation and size of audience, most CATV systems—and especially the large systems developing in metropolitan centers—are also far more actively engaged in communicating copyrighted performances to their customers than is a local motion picture theatre which merely retransmits to a couple of thousand people each week the performance embodied in a motion picture film.

Finally, Section 1(e) refutes the majority opinion's conclusion that if CATV were held to be engaged in public performance, the manufacturers of television sets could also be deemed to "publicly perform." Obviously, Congress did not believe that because the operation of coin-operated or other commercially used phonographs was a public performance, manufacturers of the machines would be infringers. They are not, and no one has ever claimed they are. Obviously the manufacturer of a television set (or CATV equipment) would not be guilty of infringement because a purchaser used it for unauthorized public performances just as the manufacturer of a motion picture camera, or projector, or printing press is not liable for infringement if a purchaser used it to produce piratical copies or performances of a copyrighted work.

POINT II

CATV's communication of copyrighted works violates the other rights granted in Section 1(d).

In addition to the right of "public performance," Congress in 1909 also granted the author of a dramatic work the rights to "exhibit . . . , represent, produce or reproduce it in any manner or by any method whatsoever". However, the majority opinion did not consider whether the activities

of CATV violated any right other than that of "public performance." It must be presumed that in using these other terms Congress intended to grant more than the right of "public performance." In *Ex Parte Public Bank,* 278 U. S. 101, this Court declared:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignficant.'' ' *Market Co.* v. *Hoffman,* 101 U.S. 112, 115."

And in *Skovgaard* v. *The M/V Tungus,* 252 F. 2nd 14; aff'd 358 U.S. 588, the court said:

> "It it presumed that the legislature did not employ useless verbiage and that each word has independent meaning." (at p. 17)

We respectfully submit that Congress in 1909 intended to grant the author of a dramatic work the right to furnish performances of it to the public "by any manner or by any method whatsoever." The use of copyrighted works by CATV systems come well within the broad area of rights granted to authors of these works in Section 1.

POINT III

The creation of a CATV exemption is inconsistent with the purpose and constitutional mandate of the Copyright Act and will damage authors, the public and non-commercial television.

We respectfully submit that the Court's restricted interpretation of the rights granted authors in Section 1(d) is completely inconsistent with the purpose of the Copyright Act and the Constitutional mandate. As the Court pointed out in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954), the economic philosophy underlying the power to grant authors "the *exclusive* Right to their respective writings" (emphasis supplied) is to encourage individual effort by personal gain, as the best way of advancing the public welfare. Until now courts, including this Court, have never denied the author the right to control the use of his work in a new industry or medium of communication. Until now the courts have recognized that the author is entitled to compensation for the commercial use of his work whether "money is taken in at the door" or the user exploits his work by other means. *Herbert* v. *Shanley Co.*, 242 U. S. 591, 594.

The Constitutional mandate speaks of granting authors the "exclusive" right in their work. This does not suggest that rights granted by Congress should be narrowly interpreted by the Courts. This is particularly important in the case of dramatic works, for here Congress was not merely indulging in an act of grace; it was not giving authors something they could not have had but for the Constitution. On the contrary, when an author of a dramatic work secures a statutory copyright he exchanges absolute and

perpetual personal property rights for the 56 years of protection of the Copyright Act. Unlike books, plays remain protectable under common law—so long as they are not published—even though they are widely disseminated to the public. Public performance does not dedicate them: *Ferris* v. *Frohman*, 223 U. S. 424, 435. Thus, the Register of Copyrights said:

> "Under our present copyright law, 'publication' means making copies of a work available to the public. The important point here is that public performances, such as broadcasts and stage presentations, do not constitute 'publication.'
>
> • • • • •
>
> "Consequently, as long as a work is neither published in copies nor voluntarily registered, the exclusive rights under the common law continue with no time limit, even though the work is used commercially and widely disseminated." (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress 1st Session, pp. 39-40.)

In these circumstances, we submit that the rights granted in Section 1(d) cannot be construed on the assumption that Congress intended that a great industry which earns millions of dollars by furnishing performances of copyrighted works should be exempted from the obligation to obtain the authors' permission and compensate them for this use of their property.

The Decision Creates a "Jukebox Exemption" for CATV

As we have noted, the "jukebox exemption" was granted by Congress in 1909 to the operators of one type of coin-

operated phonograph in the belief that it was a "novelty of little economic consequence." The belief soon proved to be absolutely wrong. The jukebox industry now receives over a half-billion dollars a year for furnishing performances of musical compositions (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress, 1st Session, p. 32). Everyone, except the proprietors of jukeboxes, agree that it is an unfair exemption. It is not found in the copyright law of any other country. Elsewhere composers are paid for this use of their works.

Here the Court has, in effect, written into the Copyright Act a "jukebox exemption" for the CATV industry. It is of cold comfort to authors to suggest, as the majority opinion does, that Congress can remove it. Efforts to eliminate the jukebox exemption from the Copyright Act have been unsuccessful for 40 years.

In the case of the jukebox exemption the industry was in its infancy. Here there is no doubt that the CATV industry is already a major medium for communicating performances of copyrighted works. An article in CATV, the trade journal of the industry, recently stated:

> "In contrast to the neophyte community antenna television industry of 1962, today cable television numbers more than 1400 strong, unified firms . . . serving 10 million American citizens. That these Americans rely on cable TV for a basic part of their entertainment and enlightenment is becoming increasingly apparent to our Federal lawmakers. Furthermore, the solid position of many large corporations in the CATV business can be ignored by neither the FCC majority nor Congress.

> "Unlike 1962 . . . the cable business of 1968 belongs substantially to companies like Westinghouse, GE, Gulf & Western, Time-Life, Foote, Cone & Belding, Hughes-TelePrompTer, CBS, NBC, Jefferson-Carolina, General Telephone, United Utilities, Kaiser, Cox Broadcasting, General Instruments, Meredith-Avco, Narragansett Capital, Jack Kent Cooke, Reeves Broadcasting and Storer Broadcasting . . . to name some of the companies which have substantially enlarged their position in CATV during the past few years. Other companies which have shown a definite interest in CATV include McDonnell-Douglas, General Mills, Litton Industries . . . plus a number of communications and entertainment-oriented giants." (CATV, Aug. 18, 1968, p. 4)

The exemption of CATV from the rights granted in Section 1 inevitably will damage not only authors but also the public. As the CATV industry and its audiences expand, producers of motion pictures, plays and other works will license CATV systems to originate transmissions. (Such arrangements for motion pictures are now being negotiated in New York and other areas.) As this CATV market becomes more profitable for producers of motion pictures and other works, it will become uneconomical for them to release their works for broadcast on television, under the Court's decision. For CATV systems which do not originate programs could pick up those broadcasts and retransmit them. The producers of motion pictures and other works could only protect the value and income of their works in the CATV medium by withholding them from television so they would only be accessible to CATV on a licensing basis.

Moreover, the decision will adversely affect nonprofit television stations and their audiences. These broadcasters pay

little or nothing for the right to broadcast performances of plays and other works. Under the decision, CATV systems could receive these broadcasts and retransmit them without paying the authors. While the author of a play may be willing to license a performance by a nonprofit station to its local audience for a nominal consideration, he cannot afford to have it performed on that basis if it could be carried by CATV systems to nation-wide audiences. Such a broadcast would seriously impair the value of his rights to have the play performed throughout the country by professional and amateur theatres and could also destroy the value of his motion picture and commercial television rights. The only way the author could protect these rights would be by withholding the right to produce the play from nonprofit stations —and even in some instances from commercial television stations. The authors of non-dramatic literary works are even more unfairly affected by the decision. A nonprofit station may now perform a non-dramatic literary work without permission because it is nonprofit (receiving no compensation). However, under the decision CATV systems are free to retransmit the performances of such works to paying audiences throughout the country, without compensating the author.

CONCLUSION

It is respectfully submitted that the petition for a rehearing should be granted.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

The undersigned counsel for the applicant, The Authors League of America, hereby certifies, pursuant to Rule 58 of the Rules of this Court, that the foregoing brief *amicus curiae* in support of the petition for rehearing is presented in good faith and not for delay.

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

vs.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMICUS CURIAE TO PARTICIPATE IN ORAL ARGUMENT

The National Association of Broadcasters ("NAB") has this day filed a motion for leave to file an annexed brief *amicus curiae* in this case. The television broadcast industry has, as that brief shows, a heavy interest in the outcome of this case.

NAB has the same position as respondent on the issues of infringement and license implied in law, and does not request oral argument on these issues.

NAB urges, however, that this case should not be decided upon the premise, assumed by ~~both parties~~ petitioner and the Solicitor General, that a decision of infringement will bring automatic imposition of full copyright liability upon every

CATV system. The issues which bear on the extent of damages and profits remain to be tried. The ordinary exercise of judicial discretion can be expected to protect against unreasonable or oppressive results when those issues are reached. There is, accordingly, no occasion to strain the law, as does the memorandum for the United States, in premature search of a "middle ground" to avoid a result which is in any case unlikely.

We consider that ten minutes of oral argument would permit us to give the essence of our position in this respect, and have hope that its presentation might be of some help to the Court. We accordingly move, under Rule 44(7), for leave to participate to the extent of ten minutes, additional to the time allowed the respective parties, in the oral argument of this case.

Respectfully submitted,

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734 Fifteenth Street, N. W.
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Attorney for National Association of Broadcasters.

February 17, 1968

SUPREME COURT OF THE UNITED STATES

No. 618.—October Term, 1967.

Fortnightly Corporation, Petitioner, *v.* United Artists Television, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 17, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner, Fortnightly Corporation, owns and operates community antenna television (CATV) systems in Clarksburg and Fairmont, West Virginia.[1] There were no local television broadcasting stations in that immediate area until 1957. Now there are two, but, because of hilly terrain, most residents of the area cannot receive the broadcasts of any additional stations by ordinary rooftop antennas. Some of the residents have joined in erecting larger cooperative antennas in order to receive more distant stations, but a majority of the householders in both communities have solved the problem by becoming customers of the petitioner's CATV service.[2]

The petitioner's systems consist of antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the sig-

[1] For a discussion of CATV systems generally, see *United States* v. *Southwestern Cable Co., ante,* at —.

[2] In 1960, out of 11,442 occupied housing units in the Clarksburg area, about 7,900 subscribed to the petitioner's CATV service; out of 9,079 units in Fairmont, about 5,100 subscribed.

nals efficiently while maintaining and improving their strength.[3]

During 1960, when this proceeding began, the petitioner's systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania, one in Steubenville, Ohio, and one in Wheeling, West Virginia.[4] The distance between those cities and Clarksburg and Fairmont ranges from 52 to 82 miles.[5] The systems carried all the programing of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. The petitioner neither edited the programs received nor originated any programs of its own.[6] The petitioner's customers were charged a flat monthly rate regardless of the amount of time that their television sets were in use.[7]

The respondent, United Artists Television, Inc., holds copyrights on several motion pictures. During the period in suit, the respondent (or its predecessor) granted various licenses to each of the five television stations in question to broadcast certain of these copyrighted motion pictures. Broadcasts made under these licenses were received by the petitioner's Clarksburg and Fairmont CATV systems and carried to its customers. At no time

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[3] The petitioner's systems utilized modulating equipment only during the period 1958–1964.

[4] Since 1960, some changes have been made in the stations carried by each of the petitioner's systems. As of May 1, 1964, the Clarksburg system was carrying the two local stations and three of the more distant stations, and the Fairmont system was carrying one local station and four of the more distant stations.

[5] Clarksburg and Fairmont are 18 miles apart.

[6] Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion.

[7] The monthly rate ranged from $3.75 to $5, and customers were also charged an installation fee. Increased charges were levied for additional television sets and for commercial establishments.

did the petitioner (or its predecessors) obtain a license under the copyrights from the respondent or from any of the five television stations. The licenses granted by the respondent to the five stations did not authorize carriage of the broadcasts by CATV systems, and in several instances the licenses specifically prohibited such carriage.

The respondent sued the petitioner for copyright infringement in a federal court, asking damages and injunctive relief. The issue of infringement was separately tried, and the court ruled in favor of the respondent. 255 F. Supp. 177. On interlocutory appeal under 28 U. S. C. § 1292 (b), the Court of Appeals for the Second Circuit affirmed. 377 F. 2d 872. We granted certiorari, 389 U. S. 969, to consider an important question under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 *et seq.*

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.[8] Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright.[9] If a person,

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[8] See, *e. g., Fawcett Publications* v. *Elliot Publishing Co.*, 46 F. Supp. 717; *Hayden* v. *Chalfont Press, Inc.*, 281 F. 2d 543, 547–548.

"The fundamental [is] that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . . ." Kaplan, An Unhurried View of Copyright 57 (1967).

[9] "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon,

without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe.[10] The respondent's contention is that the petitioner's CATV systems infringed the respondent's § 1 (c) exclusive right to "perform . . . in public for profit" (nondramatic literary works)[11] and its § 1 (d) exclusive

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address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . ." 17 U. S. C. § 1.

[10] The Copyright Act does not contain a definition of infringement as such. Rather infringement is delineated in a negative fashion by the § 1 enumeration of rights exclusive to the copyright holder. See Nimmer, Copyright § 100 (1967).

[11] See n. 9, *supra*. We do not reach the petitioner's claim that the respondent's animated cartoons are not "literary works."

right to "perform . . . publicly" (dramatic works).[12] The petitioner maintains that its CATV systems did not "perform" the copyrighted works at all.[13]

At the outset it is clear that the petitioner's systems did not "perform" the respondent's copyrighted works in any conventional sense of that term,[14] or in any manner envisaged by the Congress that enacted the law in 1909.[15] But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.[16] In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.[17]

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[12] See n. 9, *supra*.

[13] The petitioner also contends that if it did "perform" the copyrighted works, it did not do so "in public."

[14] Cf. *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1.

[15] The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript. H. R. Rep. No. 2222, 60th Cong., 2d Sess., 4 (1909).

[16] "While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries." *Jerome Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411.

[17] A revision of the 1909 Act was begun in 1955 when Congress authorized a program of studies by the Copyright Office. Progress has not been rapid. The Copyright Office issued its report in 1961. Register of Copyrights, Report on the General Revision of the U. S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. (1961). Revision bills were introduced in the House in the Eighty-eighth Congress and in both the House and the Senate in the Eighty-ninth Congress. See H. R. 11947, 88th Cong., 2d Sess.; Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th

The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV systems "performed" the copyrighted works was: "[H]ow much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?" 377 F. 2d, at 877. Applying this test, the court found that the petitioner did "perform" the programs carried by its systems.[18] But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manu-

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Cong., 2d Sess. (1966). H. R. 4347 was reported favorably by the House Judiciary Committee, H. R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but not enacted. In the Ninetieth Congress revision bills were again introduced in both the House (H. R. 2512) and the Senate (S. 597). The House bill was again reported favorably, H. R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and this time, after amendment, passed by the full House. 113 Cong. Rec. H3888 (April 11, 1967). The bill as reported contained a provision dealing with CATV, but the provision was struck from the bill on the House floor prior to enactment. See n. 33, *infra*. The House and Senate bills are currently pending before the Senate Subcommittee on Patents, Trademarks, and Copyrights.

[18] The court formulated and applied this test in the light of this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191. See also *Society of European Stage Authors & Composers* v. *New York Hotel Statler Co.*, 19 F. Supp. 1. But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U. S., at 199, n. 5. The *Jewell-LaSalle* decision must be understood as limited to its own facts. See n. 30, *infra*.

facturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals,[19] and broadcasts the signals at radio frequency for public reception.[20] Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.[21]

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the

[19] If the broadcaster obtains his program from a network, he receives the electronic signals directly by means of telephone lines or microwave.

[20] Broadcasting is defined under the Communications Act of 1934 as "the dissemination of radio communication intended to be received by the public . . . ." 47 U. S. C. § 153 (*o*).

[21] See Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., at 1312–1318 (1965).

Copyright Act,[22] broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform.[23] Viewers do not perform.[24] Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line.[25] Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set.[26] It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the

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[22] See n. 15, *supra*.

[23] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (radio broadcast); *Associated Music Publishers* v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (radio broadcast of recorded program); *Select Theatres Corp.* v. *Ronzoni Macroni Co.*, 59 U. S. P. Q. 288 (D. C. S. D. N. Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to § 1 (c) a special damages provision for "infringement by broadcast." 66 Stat. 752.

[24] "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Buck* v. *DeBaum*, 40 F. 2d 734, 735.

"[T]hose who listen do not perform . . . ." *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829.

[25] While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case.

[26] Cf. *Lilly* v. *United States*, 238 F. 2d 584, 587:

"[T]his community antenna service was a mere adjunct of the television receiving sets with which it was connected . . . ."

equipment serves is little different from that served by the equipment generally furnished by a television viewer.[27] If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters.[28] CATV systems do

[27] The District Court's decision was based in large part upon its analysis of the technical aspects of the petitioner's systems. The systems have contained at one time or another sophisticated equipment to amplify, modulate, and convert to different frequencies the signals received—operations which all require the introduction of local energy into the system. The court concluded that the signal delivered to subscribers was not the same signal as that initially received off the air. 255 F. Supp., at 190–195. The Court of Appeals refused to attach significance to the particular technology of the petitioner's systems, 377 F. 2d, at 879, and we agree. The electronic operations performed by the petitioner's systems are those necessary to transmit the received signal the length of the cable efficiently and deliver a signal of adequate strength. Most of the same operations are performed by individual television sets and antennas. See Hearings on H. R. 4347 before the Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., at 1312–1318 (1965). Whether or not the signals received and delivered are the "same," the entire process is virtually instantaneous, and electronic "information" received and delivered is identical. 255 F. Supp., at 192.

[28] Cf. *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315, 325:

"[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes.

"[Broadcasters] are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broad-

not in fact broadcast or rebroadcast.[29] Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.[30]

We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy.[31] We decline the invitation.[32] That

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casts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as may be equipped to receive them.

"[CATV systems], on the other hand, have nothing to do with sponsors, program content or arrangement. They sell community antenna service to a segment of the public for which [broadcasters'] programs were intended but which is not able, because of location or topographical condition, to receive them without rebroadcast or other relay service by community antennae. . . ."

[29] *Cable Vision, Inc.* v. *KUTV, Inc.*, 211 F. Supp. 47, vacated on other grounds, 355 F. 2d 348; *Report and Order on CATV and TV Repeater Services*, 26 F. C. C. 403, 429–430.

[30] It is said in dissent that, "Our major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until Congress legislates . . . ." *Post*, at —. But existing "business relationships" would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context, *post*, at —, n. 3, so as retroactively to impose copyright liability where it has never been acknowledged to exist before. See n. 18, *supra*.

[31] Compare, *e. g.*, CATV and Copyright Liability, 80 Harv. L. Rev. 1514 (1967); CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505 (1966); Kaplan, An Unhurried View of Copyright 104–106 (1967); Statement of then

[*Footnote 32 on page 11*]

job is for Congress.[33] We take the Copyright Act of 1909 as we find it. With due regard to changing technology, we hold that the petitioner did not under that law "perform" the respondent's copyrighted works.

The judgment of the Court of Appeals is *Reversed.*

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN took no part in the decision of this case.

Acting Assistant Attorney General (Antitrust Division) Edwin Zimmerman, Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess., at 211–219 (1966).

[32] The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us "imply" a license for the CATV "performances." This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the "Grade B Contour" of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works, we do not reach the question of implied license.

[33] The copyright revision bill recently passed by the House, see n. 17, *supra,* originally contained a detailed and somewhat complex provision covering CATV. H. R. 2512, 90th Cong., 1st Sess., § 111. Congressman Willis, chairman of the subcommittee which reported the bill, described the bill in terms of its effect on the District Court's decision in the present case:

"By, in effect, repealing the court decision which would impose full copyright liability on all CATV's in all situations, the committee recommends H. R. 2512, which would exempt them in some situations, make them fully liable in some, and provide limited liability in others." 113 Cong. Rec. H3614 (April 6, 1967).

See H. R. Rep. No. 83, 90th Cong., 1st Sess., 6–7, 48–59 (1967). On the House floor the CATV provision was deleted in order to

Footnote 33—Continued.

refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications. 113 Cong. Rec. H3624–3626, 3636–3637, 3644–3647, 3857–3859 (April 6 and 11, 1967). In urging deletion of the CATV provision, Congressman Moore said:

"[W]hat we seek to do in this legislation is control CATV by copyright. I say that is wrong. I feel if there is to be supervision of this fast-growing area of news media and communications media, it should legitimately come to this body from the legislative committee that has direct jurisdiction over the same.

". . . This bill and the devices used to effect communications policy are not proper functions of copyright . . . ." 113 Cong. Rec. H3625 (April 6, 1967).

SUPREME COURT OF THE UNITED STATES

No. 618.—October Term, 1967.

Fortnightly Corporation, Petitioner,
v.
United Artists Television, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 17, 1968.]

Mr. Justice Fortas, dissenting.

This case calls not for the judgment of Solomon but for the dexterity of Houdini. We are here asked to consider whether and how a technical, complex, and specific Act of Congress, the Copyright Law, which was drafted in 1909, applies to one of the recent products of scientific and promotional genius, CATV. The operations of CATV systems are based upon the use of other people's property. The issue here is whether, for this use, the owner of copyrighted material should be compensated. From a technical standpoint the question—or at least one important question—is whether the use constitutes a "performance" of the copyrighted material within the meaning of § 1 (c) of the Copyright Act, 17 U. S. C. § 1 (c). But it is an understatement to say that the Copyright Act, including the concept of a "performance," was not created with the development of CATV in mind. The novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a television set with a mallet. And no aid may be derived from the recent attempts of Congress to formulate special copyright

rules for CATV—for Congress has vacillated in its approach.[1]

At the same time, the implications of any decision we may reach as to the copyright liability of CATV are very great. On the one hand, it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights of materials used in the television industry. On the other hand, it is foreseen that a decision to the effect that CATV systems never infringe the copyrights of the programs they carry would permit such systems to overpower local broadcasting stations which must pay, directly or indirectly, for copyright licenses and with which CATV is in increasing competition.[2]

The vastness of the competing considerations, the complexity of any conceivable equitable solution to the problems posed, and the obvious desirability of ultimately leaving the solution to Congress induced the Solicitor General, in a memorandum filed prior to oral argument in this case, to recommend "that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution."

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[1] See Kaplan, An Unhurried View of Copyright 105–106, 127–128 (1967).

[2] The Solicitor General, in his brief on the merits, recommends that we adopt a compromise approach—finding a license implied in law with respect to some CATV operations, but not with respect to others. Regardless of the advisability of such an approach from the standpoint of communications, antitrust, and other relevant policies, I do not believe it is open to us, in construing the Copyright Act, to accept the Solicitor General's proposal.

That is a splendid thought, but unhappily it will not do. I agree with the majority that we must pass on the instant case. An important legal issue is involved. Important economic values are at stake, and it would be hazardous to assume that Congress will act promptly, comprehensively, and retroactively. But the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object, I suggest, should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face.

The opinion of the majority, in my judgment, does not heed this admonition. In an attempt to foster the development of CATV, the Court today abandons the teachings of precedent, including a precedent of this Court (see *Buck* v. *Jewell-LaSalle Realty Corp.*, 283 U. S. 191 (1931); *Society of European Stage Authors and Composers* (*SESAC*) v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (1937)), as to the meaning of the term "perform" in the Copyright Act. It is not our general practice to reverse ourselves, without compelling reasons to do so, on matters of statutory construction, especially on a construction of many years' standing under which an entire industry has operated.[3] Yet today's decision might not be objectionable, if the majority replaced what it considers an outmoded interpreta-

[3] Nimmer, a leading authority in the copyright field, states that although "the two major performing right societies, ASCAP and BMI, do not choose to enforce the *Jewell-LaSalle* doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers, . . . such demands are made of hotels which operate in the manner of the LaSalle Hotel." Nimmer, Copyright § 107.41, n. 204 (1967).

tion of the term "perform" with a new, equally clear, and workable interpretation. It does not, however, do this. It removes from the copyright law an interpretation which, though perhaps not altogether satisfactory as an analytical matter,[4] has at least been settled for nearly 40 years; and it substitutes for that discarded interpretation a rule which I do not believe is an intelligible guide for the construction of the Copyright Act. Moreover, the new rule may well have disruptive consequences outside the area of CATV.

The approach manifested in the opinion of the Court is disarmingly simple. The Court merely identifies two groups in the general field of television, one of which it believes may clearly be liable, and the other clearly not liable, for copyright infringement on a "performance" theory: "Broadcasters perform. Viewers do not perform." From this premise, the Court goes on to hold that CATV "falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment performs is little different from that performed by the equipment generally furnished by a television viewer." *Ante*, pp. 8–9.

The decision in *Buck* v. *Jewell-LaSalle*, must, the Court says today, "be understood as limited to its own facts." *Ante*, n. 16. In *Buck*, the Court, speaking unanimously through Mr. Justice Brandeis, held that a hotel which received a broadcast on a master radio set and piped the broadcast to all public and private rooms of the hotel had "performed" the material that had been broadcast. As I understand the case, the holding was that the use

[4] See Nimmer, Copyright § 107.41 (1967).

of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a "performance" of the material originally broadcast. I believe this decision stands squarely in the path of the route which the majority today traverses. If a CATV system performs a function "little different from that performed by the equipment generally furnished by a television viewer," and if that is to be the test, then it seems to me that a master radio set attached by wire to numerous other sets in various rooms of a hotel cannot be distinguished.[5]

The vague "functional" test of the meaning of the term "perform" is, moreover, unsatisfactory. Just as a CATV system performs (on the majority's analysis) the same function as the antenna of the individual viewer, so a television camera recording a live drama performs the same function as the eye of a spectator who is present in the theater. Both the CATV and the television camera "receive programs that have been released to the public and [carry] them by private channel to additional viewers." *Ante* p. 10. Moreover, the Court has indulged in an oversimplification of the "function" of CATV. It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little

[5] The majority attempts to diminish the compelling authority of *Buck* v. *Jewell-LaSalle*, by referring to a vague footnote in that opinion to the effect that the Court might not have found a "performance" if the original broadcast, which was picked up by the hotel and brought to its various rooms, had been authorized by the copyright holder—as it was not. I cannot understand the point. Whatever might be the case in a contributory infringement action (which this is not), the interpretation of the term "perform" cannot logically turn on the question whether the material that is used is licensed or not licensed.

more than a "cooperative antenna" employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves. In such a case the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes.

Buck v. *Jewell-LaSalle* may not be an altogether ideal gloss on the word "perform," but it has at least the merit of being settled law. I would not overrule that decision in order to take care of this case or the needs of CATV. This Court may be wrong. The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

I see no alternative to following *Buck* and to holding that a CATV system does "perform" the material it picks up and carries. I would, accordingly, affirm the decision below.